United States Court of Appeals for the Second Circuit



APPENDIX

United States Court of Appeals

For the Second Circuit.

RENEE KALSCHEUR, a minor, by her parents and natural guardians, Norbert Kalscheur and Isabel Kalscheur, and NORBERT KALSCHEUR and ISABEL KALSCHEUR, in their own right, Plaintiffs-Appellees,

against

JACK ROUNICK and LOIS ROUNICK, Defendants-Appellants.

and

215 EAST 68TH STREET, INC., Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

JOINT APPENDIX.

DANIEL J. COUGHLIN, Attorney for Defendants-Appellants, Jack Rounick and Lois Rounick, 110 William Street, New York, N. Y. 10038

(212) BE 3-5010.

McLaughlin, Fiscella & Gervais, Attorneys for Defendant-Appellant, 215 East 68th Street, Inc., 80 John Street,

New York, N. Y. 10038 (212) 248-4430.

NORMAN J. LANDAU, Attorney for Plaintiffs-Appellees,

233 Broadway, New York, N. Y. 10007 (212) WO 2-7545.

Of Counsel. KREMER, KRIMSKY & LUTERMAN, P. C., One East Penn Square,
Philadelphia, Pa. 19107
(215) LO 4-3606.

29 1974

THE REPORTER COMPANY, INC., New York, N. Y. 10007-212 732-6978-1974 (4031)

PAGINATION AS IN ORIGINAL COPY

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United States Court of Appeals

FOR THE SECOND CIRCUIT.

Renee Kalscheur, a minor, by her parents and natural guardians, Norbert Kalscheur and Isabel Kalscheur, and Norbert Kalscheur and Isabel Kalscheur, in their own right,

Plaintiffs-Appellees,

against

JACK ROUNICK and Louis Rounick,

Defendants-Appellants,

and

215 East 68th Street, Inc.,

Defendant-Appellant.

Docket Entries.

Date

1970

July 23 Filed complaint issued summons

Sept. 16 Filed summons with marshal's return. Served Jack Rounick by Lois Rounick on 8-10-70 Served

Dec. 16 Filed Notice of Motion re: Dimiss Complaint.

Pet. 12/21/70, together with affidavit in support thereof.

Dec. 29 Filed stipulation adjourning motion now ret. 12/29/70 to 1/19/71.

1971

Jan. 13 Filed Memorandum of Law in support of application by defts. Jack Rounick and Lois Rounick.

Docket Entries

- Jan. 19 Filed stipulation adjourning motion now ret. 1/19/71 to 2/2/71.
- Feb. 3 Filed Memo. End. on motion filed 12-16-70 Motion withdrawn. So Ordered. Bryan J.
- Mar. 2 Filed Interrogatories propounded to plaintiff.
- Mar. 2 Filed Answer of defts. Jack Rounick and Lois Rounick to complaint, and jury demand.
- June 17 Filed Amended Complaint.
- June 17 Issued additional summons.
- June 17 Filed Plaintiff's Answers to Interrogatories.
- June 21 Filed stipulation and order permitting the plaintiffs to amend their complaint. So ordered. Gurfein, J.
- Aug. 17 Filed Additional Summons with Marshal's ret. Served John Steinman C/O Rudin Mgnt. Corp. by Michael C. O'Brien on 6-22-71
- Sept. 24 Filed pltff's interrogs addressed to deft's
- Sept. 27 Filed deft's interrogs addressed to pltff.
- Sept. 27 Filed deft's (215 East 68th St.) Answer to amended complaint.
- Oct. 26 Filed deft's (L. Rounick & J. Rounick Answer to cross-complaint.
 - 1972
- May 31 Filed deft's answers to pltff's interrogs.
- June 12 Filed pltff's answers to interrogs.
- Feb. 21 Filed Defts affdyt & notice of motion for an order permitting defts to amend their pleading to contain a cross-complaint against deft 215 East 68th St Inc., Ret: 3-16-73.
- Apr. 25 Filed Pltffs Notice of Trial.
- May 25 Filed Memorandum of Law.
- May 25 Filed Memo. End. on motion papers filed 2/21/73. Motion file an amended answer permitting defendants Jack and Lois Rou-Nick to file a cross complaint against the deft. 218 E. 68 St. Inc. is granted. Carter, J.

Docket Entries

- June 18 Pre-Trial Conference Held By Carter, J. 1974
- Mar. 18 Pre-trial conference held-Connor, J.
- Mar. 18 Before Conner, J. Jury trial begun.
- Mar. 19 Trial continued.
- Mar. 20 Trial continued
- Mar. 21 Trial continued and concluded. Jury verdict for pltff. in amount of \$31,800. Clerk to enter Judgment
- Mar. 28 Filed Judgment #74,302—ordered that pltffs.

 Renee Kalscheur, a Minor by her parents and natural guardian, Norbert Kalscheur and Isabel Kalscheur, and Norbert Kalscheur and Isabel Kalscheur in their own right, have judgment against the defts., Jack Rounick and Lois Rounick and 215 East 68th Street, Inc. in the amount of \$31,800.00—Clerk Judgment entered 2-28-74. Entered 3-28-74 (mailed notices)
- Apr. 25 Filed defts. Jack Rounick and Lois Rounick notice of appeal from Judgment filed on 3-28-74. Copies mailed to: Norman J. Landau and McLaughlin, Fiscella & Gervais. Entered 4-25-74.
- Apr. 25 Filed bond for undertaking on appeal in the sum of \$35,548.00—Insurance Company of North America.
- Apr. 26 Filed deft. 215 East 68th Street, Inc.'s notice of appeal from Judgment filed 3-28-74.

 Mailed copies to: Norman J. Landau, Daniel J. Coughlin and Kremer, Krimsky & Luterman. Entered 3-26-74.
- Apr. 29 Filed supersede as bond in the sum of \$35,548.00—The Travelers Indemnity Company

Docket Entries

- May 6 Filed pltffs' notice of cross-appeal from court's order denying pltffs' points for charge dealing with the statutory duty owned by defts. to, pltffs. etc. Copies mailed to: Daniel J. Coughlin and McLaughlin, Fiscella & Gervais entered 5-6-74
- May 7 Filed deft. 215 East 6th Street, Inc. requests to charge.
- May 30 Filed trial memo of deft. 215 E 6th St Inc.
- June 7 Filed stipulation between counsel for respective parties that pltffs cross appeal is hereby withdrawn.
- June 14 Filed transcript of proceeding dtd March 18, 19, 20, 21, 1974

Amended Complaint.

UNITED STATES DISTRICT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

Renee Kalscheur, a minor by her parents and natural guardians, Norbert Kalscheur and Isabel Kalscheur and Norbert Kalscheur and Isabel Kalscheur in their own right,

Plaintiffs,

against

JACK ROUNICK and Lois ROUNICK and 215 East 68th Street, Inc.,

Defendants.

70 Civ. 3163

Plaintiffs, complaining of the defendants, by their attorneys, Harry Issler and Martin M. Krimsky, respectfully allege:

As and for a first cause of action on behalf of plaintiff, Renee Kilscheur

FIRST: Plaintiff, Norbert Kalscheur, is the father and natural guardian of Renee Kalscheur, who presently resides in Sauk City, Wisconsin and both Norbert Kalscheur and Renee Kalscheur are citizens of the State of Wisconsin.

SECOND: Upon information and belief, that at all times hereinafter mentioned, Jack Rounick and Lois Rounick are citizens of the State of New York, residing at 215 East 68th Street, New York City, New York.

Amended Complaint

THIRD: Upon information and belief, that at all times hereinafter mentioned, defendant 215 East 68th Street, Inc., is a corporation duly organized and existing under and by virtue of the laws of the State of New York, having a place of business and doing business in the State of New York.

FOURTH: Upon information and belief, that at all times hereinafter mentioned and for a period of time prior thereto, defendant 215 East 68th Street, Inc., were the owners and had control of a building and premises which was an apartment building located at 215 East 68th Street, New York City, New York.

FIFTH: Upon information and belief, that at all times hereinafter mentioned and for a period of time prior thereto, defendants Jack Rounick and Lois Rounick, maintained and controlled an apartment and were tenants of a certain apartment located in the building known as 215 East 68th Street, New York City, New York.

SIXTH: Upon information and belief, that at all times hereinafter mentioned, all defendants, their agents, servants and/or employees managed, maintained, operated and controlled the aforesaid premises and various portions thereof containing therein a certain glass window door, contained in said apartment.

SEVENTH: On or about the 10th day of July, 1968, while minor plaintiff, Renee Kalscheur, was lawfully at the defendants' premises, due to the negligence of the defendants, their agents, servants and/or employees in the ownership, construction, operation, maintenance and control of said premises, and the certain glass door, thereat, said plaintiff unknowingly came into contact with said glass door, believing it to be a means of ingress and egress, and came into contact therewith, with the result that it broke, splintered and crashed down upon said minor plaintiff, causing minor plaintiff to sustain serious, painful and permanent injuries.

Amended Complaint

EIGHTH: As a result of the foregoing, said minor plaintiff, sustained serious, painful and permanent personal injuries, and was rendered sick, sore, lame and disabled, sustained severe nervous shock, mental anguish and great physical pain, permanent scarring and disfigurement, was confined to bed and home for a substantial period of time, was prevented from engaging in her normal activities and vocation for a substantial period of time and was compelled to undergo medical aid, treatment and attentions, she sustained loss of earnings and/or earning capacity and has sustained a permanent detrimental effect on her future earning capacity and since some of her injuries are of a permanent and lasting nature, she will continue to suffer similar damages in the future.

NINTH: The injuries so sustained by minor plaintiff, Renee Kalscheur, were in nowise caused through any carelessness and negligence on her part but were caused solely through the carelessness, negligence and recklessness of the defendants, their agents, servants and/or employees in failing to warn said minor plaintiff of the condition of said glass door at the premises aforesaid in that they were constructed, installed and maintained in a careless, negligent and reckless manner causing it to be in an unsafe condition; in that the defendants failed to indicate to the plaintiff and others that the said glass door was unmarked; that said defendants maintained, operated and controlled the glass door in an unmarked and dangerous condition; said defendants failed to safeguard the plaintiff and others from colliding with the unmarked glass door; said defendants failed to inspect the unmarked glass window; and in other ways acted in a careless, reckless and negligent manner.

TENTH: That the defendants, their agents, servants and/or employees had actual and/or constructive notice of the conditions complained of.

Amended Complaint

ELEVENTH: As a result of the foregoing, plaintiff, Renee Kalscheur, was damaged in the sum of One Hundred Fifty Thousand (\$150,000.00) Dollars.

As and for a second cause of action on behalf of the plaintiff, Norbert Kalscheur

TWELFTH: Plaintiff repeats, reiterates and realleges each and every allegation herein before set forth paragraphs designated "First" through "Tenth", inclusive, with the same force and effect as if set forth herein in extenso.

THIRTEENTH: Plaintiff, Norbert Kalscheur, is the father of minor plaintiff, Renee Kalscheur, and as a result of the aforementioned accident has expended considerable sums of money to secure medical treatment in an effort to cure the injuries suffered by his daughter, minor plaintiff Renee Kalscheur. It is foreseeable that he will be forced to make similar expenditures for an indefinite time into the future.

FOURTEENTH: By reason of the foregoing, plaintiff Norbert Kalscheur, has been damaged in the sum of Ten Thousand (\$10,000.00) Dollars.

Wherefore, plaintiffs deemed judgment against defendants the first cause of action on behalf of minor plaintiff, Renee Kalscheur, in the sum of One Hundred Fity Thousand (\$150,000.00) Dollars and on the second cause of action on behalf of plaintiff, Norbert Kalscheur, in the sum of Ten Thousand (\$10,000.00) Dollars together with the costs and disbursements of this action.

NORMAN J. LANDAU and HARRY ISSLER
Attorneys for Plaintiff
Office & P. O. Address
233 Broadway
New York, New York 10007

Amended Answer of Defendants Jack Rounick and Lois Rounick.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE.]

Defendants, Jack Rounick and Lois Rounick, by Daniel J. Coughlin, their attorney, as and for their amended answer, allege:

Answering first cause of action

- 1. Deny that they have knowledge or information thereof sufficient to form a belief as to the truth of each and every allegation contained in paragraphs designated "First", "Third" and "Fourth".
- 2. Deny each and every allegation contained in paragraph designated "Fifth" except admit that they accepted as tenants a certain apartment located in the building known as 215 East 68th Street, New York City, New York.
- 3. Deny each and every allegation contained in paragraphs designated "Sixth", "Seventh", "Eighth", "Ninth", "Tenth" and "Eleventh".

Answering second cause of action

- 4. Answering paragraph designated "Twelfth", answering defendants make the same admissions and denials as were made above to the paragraphs referred to.
- 5. Deny each and every allegation contained in paragraphs designated "Thirteenth" and "Fourteenth".

Amended Answer of Defendants Jack Rounick and Lois Rounick

FIRST DEFENSE

6. That any injuries allegedly sustained by the plaintiff were caused, or contributed to, by the negligence and carelessness of the plaintiff.

SECOND DEFENSE

7. That any injuries allegedly sustained by the plaintiff were caused, or contributed to, by the negligence and carelessness of such others over whom these answering defendants had no control.

CROSS-COMPLAINT AGAINST DEFENDANT 215 EAST 68TH STREET, INC.:

- 8. That at the time mentioned defendant 215 East 68th Street, Inc. (hereinafter referred to as Landlord), was the owner of, and maintained and controlled premises at 215 East 68th Street in the Borough of Manhattan, City and State of New York.
- 9. That prior to the times mentioned apartment 20S was leased by the owner to defendants Jack Rounick and Lois Rounick, (hereinafter referred to as Tenants).
- 10. That at the time Tenants took possession of the apartment it contained a certain sliding glass-window door.
- 11. That no changes in the said door were made during the occupancy of the said apartment by the Tenants.
- 12. That in the event the plaintiff sustained the injuries complained of, and if the injuries were not caused or contributed to by the negligence or carelessness of the plaintiff, or by the negligence or carelessness of others, it will be claimed by Tenants that such injuries

Amended Answer of Defendants Jack Rounick and Lois Rounick

and damages were caused and brought about by reason of the negligence and carelessness of defendant Landlord in failing to examine the premises prior to leasing the same to the Tenants; by failing to discover the hidden and latent defects in the glass door and by failing to advise Tenants of the dangers which existed on the said premises by reason of defective workmanship, material, installation and maintenance of the said glass sliding door.

13. That in the event the plaintiff recovers judgment against defendants Tenants, defendant Landlord is obligated to indemnify defendants Tenants for the entire judgment which may be recovered against them or, in the alternative, is obligated to reimburse defendants Tenants for such portion of the judgment which is directly attributable to the conduct of the defendant Landlord.

Wherefore, defendants Jack Rounick and Lois Rounick, demand judgment dismissing the amended complaint of the plaintiffs, together with costs and disbursements herein, and in the event judgment is recovered against defendants Jack Rounick and Lois Rounick by the plaintiffs herein, that said defendants have judgment over and against defendant 215 East 68th Street, Inc., for such amount of the judgment, in whole or in part, which is directly attributable to the conduct of the defendant 215 East 68th Street, Inc., together with costs and disbursements.

Dated: New York, New York February 13, 1973

DANIEL J. COUGHLIN
Attorney for Defendants
Jack Rounick and Lois Rounick
Office and P. O. Address
110 William Street
New York, New York 10038

UNITED STATES DISTRICT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

The defendant, 215 East 68th Street, Inc., answering the amended complaint, upon information and belief,

Answering a first cause of action

FIRST: The defendant, 215 East 68th Street, Inc. denies that it has any knowledge or information sufficient to form a belief as to truth to the allegations contained in paragraphs numbered "First" and "Second" of the amended complaint.

SECOND: Denies upon information and belief all the allegations contained in paragraph numbered "Fourth" of the amended complaint except admits that the defendant, 215 East 68th Street, Inc. was the owner of the building located at that address and had control of the parts used in common.

THIRD: Denies as to the defendant, 215 East 68th Street, Inc. all the allegations contained in the amended complaint numbered "Sixth", "Seventh", "Eighth", "Ninth", "Tenth" and "Eleventh".

Answering a second cause of action

FOURTH: Repeats, reiterates and realleges all the admissions and denials contained in the foregoing answer which are set forth in answer to all the allegations contained in all the paragraphs, particularly paragraphs numbered "First" through "Tenth" inclusive of the amended complaint, with the same force and effect as if herein set forth at length.

FIFTH: Denies upon information and belief as to the defendant, 215 East 68th Street, Inc. all the allegations contained in the paragraphs of the amended complaint numbered "Thirteenth" and "Fourteenth".

As and for a separate, affirmative, and complete defense to the cause and/or causes of action, if any, as stated in the complaint, this defendant, 215 East 68th Street, Inc., alleges upon information and belief:

SIXTH: That if the plaintiff suffered any injuries or damages in result of the matter set forth in the complaint which is denied such injuries or damages were not caused or contributed to any manner by this defendant, 215 East 68th Street, Inc. was caused in whole or in part by the negligence or fault of the plaintiff and/or another.

As and for a cross-complaint and as a basis for affirmative relief against the defendants, Jack Rounick and Lois Rounick, hereinafter referred to as Rounick, this defendant, 215 East 68th Street, Inc. pursuant to Rule 13 of the Federal Rules of Civil Procedure, demand that the ultimate rights of this defendant, 215 East 68th Street, Inc. and Rounick, the co-defendant in this action as between themselves be determined in this action and alleges upon information and belief:

SEVENTH: That pursuant to a lease entered into by the defendant, Rounick with the defendant, 215 East 68th Street, Inc. prior to the 10th day of July, 1968, the defendant, Rounick were and still are the lessees of a certain apartment 20F located at 215 East 68th Street, New York, New York, which apartment was at all times hereinafter mentioned under the control of the defendant, Rounick their agents, servants, and/or employees.

EIGHTH: That when the aforesaid lease was entered into by and between the parties thereto described above the defendant, Rounick represented a conveyance to the defendant, 215 East 68th Street, Inc. that the defendants, Rounick the lessee would take good care of the demised premises and fixtures therein.

NINTH: That at all times mentioned in the complaint and at all times hereinafter mentioned the defendant, Rounick used and occupy the premises in apartment 20F at 215 East 68th Street, New York, New York pursuant to the aforesaid lease as lessee of 215 East 68th Street, Inc.

TENTH: The aforesaid lease with all the conveyance therein was in full force and effect.

ELEVENTH: That the defendant, Rounick in the aforementioned lease made certain representation, warranties, and conveyance one of which recites as follows:

"10. * * Landlord or landlord's agents shall not be liable for any injury or damage to persons or property resulting from * * any other cause of whatsoever major, unless caused by or due to the negligence of the landlord, landlord's agents, servants, and/or employees;"

TWELFTH: This defendant, 215 East 68th Street, Inc. has performed any and all obligations undertaking by it in the aforesaid lease and is entitled to other representations, warranties, conveyance and whole harmless causes pursuant to the benefits from the aforesaid lease.

THIRTEENTH: That if the plaintiff, Renee Kalscheur was caused to sustained personal injuries and if certain damages were sustained at the time and place mentioned in the complaint and in the manner and amount alleged in the amended complaint through any carelessness, recklessness and/or negligence other than the carelessness,

recklessness and/or negligence of the plaintiff, Renee Kalscheur said injuries and damages were caused by reason of the violation of the terms and conditions of the aforesaid lease and also by the breached of the aforesaid conveyance by the defendants, Rounick their agents, servants, and/or employees have any judgment recovered herein by the plaintiff against this defendant, 215 East 68th Street, Inc. it will be damaged thereby and the defendants, Rounick are or will be primary responsible therefor.

FOURTEENTH: That by reason of the foregoing the defendant, Rounick will be liable to this defendant, 215 East 68th Street, Inc. and bound to indemnify this defendant, 215 East 68th Street, Inc. and in the event of a recovery herein by the plaintiff against this defendant, 215 East 68th Street, Inc. and bound to pay this defendant, 215 East 68th Street, Inc. the amount of any such recovery as well as any and all attorneys fees and costs of investigation and disbursements.

As and for a second cross-complaint and as a basis for affirmative relief against the defendant, Jack Rounick and Lois Rounick, hereinafter referred to as Rounick, the defendant 215 East 68th Street, Inc., pursuant to Rule 13 of the Federal Rules of Civil Procedure, demands that the ultimate rights of this defendant, 215 East 68th Street, Inc. and Rounick, the co-defendant in this action, as between themselves be determined in this action, and alleges upon information and belief:

FIFTEENTH: The defendant, 215 East 68th Street, Inc. repeats, reiterates and realleges each and every allegation herein before set forth in the paragraphs designated "Seventh" through "Fourteenth" inclusive with the same force and effect as if herein set forth at length.

SIXTEENTH: That at all times referred to in the amended complaint and at all times hereinafter mentioned the aforesaid apartment was under the control, charge, operation, supervision and management of the defendant, Rounick their agents, servants, and/or employees.

SEVENTEENTH: That at all times referred to in the amended complaint and at all times hereinafter mentioned it was the duty of the defendants, Rounick their agents, servants, and/or employees to keep the aforesaid apartment in good condition and repair and to warn all persons thereon of any existing dangers.

EIGHTEENTH: The plaintiff alleges in her amended complaint that on the 10th day of July, 1968 the plaintiff, Renee Kalscheur was injured due solely to the negligence of the defendants.

NINETEENTH: That said occurrence was due to the carelessness and negligence of the defendants, Rounick their agents, servents, and/or employees in the control, operation, charge, supervision and management and maintenance of the aforesaid apartment and through no fault or lack of care on the part of this defendant, 215 East 68th Street, Inc.

TWENTIETH: That if the plaintiff, Renee Kalscheur was caused to sustained certain personal injuries and if certain damages were sustained at the time and place mentioned in the amended complaint and in the manner and amount alleged in the amended complaint through any carelessness, recklessness and/or negligence other than the carelessness, recklessness and negligence of the plaintiff, Renee Kalscheur said injuries and damages were caused by reason of the sole, active, and primary carelessness, recklessness and negligence and/or affirmative acts or omissions by the defendant, Rounick their agents, servants, and/or employees and if any judgment is recovered herein

by the plaintiff against this defendant, 215 East 68th Street, Inc. it will be damaged thereby and the defendants, Rounick are or will be primary repsonsible therefor.

TWENTY-FIRST: That by reason of the foregoing the defendants, Rounick will be liable to this defendant, 215 East 68th Street, Inc. and bound to indemnify this defendant, 215 East 68th Street, Inc. in the event of a recovery herein by the plaintiff, against this defendant, 215 East 68th Street, Inc. and bound to pay to this defendant, 215 East 68th Street, Inc. the amount of any such recovery as well as any and all attorneys fees and costs of investigation and disbursements.

Wherefore, the defendant, 215 East 68th Street, Inc. demands judgment dismissing the amended complaint herein as to it with costs and further demands pursuant to Rule 13 of the Federal Rules of Civil Procedure, that the ultimate rights of this defendant, 215 East 68th Street, Inc. and Jack Rounick and Lois Rounick, the co-defendants in this action, as between themselves be determined in this action and that the defendant, 215 East 68th Street, Inc. have judgment over and against the defendant, Jack Rounick and Lois Rounick for the amount of any verdict or judgment which may be obtained herein by the plaintiff against this defendant, 215 East 68th Street, Inc. together with the costs and disbursements of this action.

Yours, etc.,

McLAUGHLIN, FISCELLA & GERVAIS

By Samuel F. Simone
A member of the firm
Attorneys for Defendant
215 East 68th Street, Inc.
Office & P. O. Address
80 John Street
New York, New York 10038
248-4430

Answer to Cross-Complaint of Defendants Jack Rounick and Lois Rounick.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

Defendants, Jack Rounick and Lois Rounick, answering the cross-complaint of defendant 215 East 68th Street, Inc., allege as follows:

Answering first cross-complaint

- 1. Deny each and every allegation contained in paragraphs designated "Seventh", "Ninth", "Tenth" and "Eleventh" except admit that at the times mentioned defendants Rounick were lessees of a certain apartment located at 215 East 68th Street, New York City and occupied the same, that the lease was a written agreement and the defendants Rounick beg leave to refer to all the terms, provisions and conditions of the said lease.
- 2. Deny each and every allegation contained in paragraphs designated "Eighth", "Thirteenth" and "Fourteenth".
- 3. Deny each and every allegation contained in paragraph designated "Twelfth" inasmuch as defendant 215 East 68th Street, Inc. failed to provide proper and serviceable equipment and failed to maintain the equipment, part of the realty, in a good and serviceable condition.

Answering second cross-complaint

4. Answering paragraph designated "Fifteenth", answering defendants make the same admissions and denials as were made above to the paragraphs referred to.

Answer to Cross-Complaint of Defendants Jack Rounick and Lois Rounick

- 5. Deny each and every allegation contained in paragraphs designated "Sixteenth", "Seventeenth", "Nineteenth", "Twentieth" and "Twenty-First".
- 6. Deny that they have knowledge or information thereof sufficient to form a belief as to the truth of each and every allegation contained in paragraph designated "Eighteenth".

Wherefore, defendants, Jack Rounick and Lois Rounick, demand judgment dismissing the cross-complaint, together with costs and disbursements herein.

Dated: New York, New York October 15, 1971

DANIEL J. COUGHLIN
Attorney for Defendants
Jack Rounick and Lois Rounick
Office and P. O. Address
110 William Street
New York, New York 10038

UNITED STATES DISTRICT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

I. Contentions of Parties

A. Contention of Plaintiff, Renee Kalscheur

On July 10, 1968, plaintiff, Renee Kalscheur, then 18 years of age, was a guest at apartment 20S in an apartment building owned operated and controlled by defendant 215 East 68th Street, Inc. Said apartment was leased to and occupied by defendants Jack and Lois Rounick.

The apartment contained an open air terrace which was adjacent to the dining room and separated from same by two glass panel doors, approximately 58" by 77 3/4". One of the glass panels was stationary and the other was a sliding door which could be completely opened. There were no markings whatsoever on the glass panels.

The lighting conditions of the apartment and terrace during the summer evenings were such that an individual, exercising reasonable care in observing the doors, might mistake the closed door for an open door in that an illusion of space was created. This dangerous condition existed for a long time prior to the date of the accident. All defendants had actual notice of same and were aware of the existence of this dangerous trap. None of the defendants warned plaintiff of this danger prior to the accident in question. Further, the doors were made of ordinary glass rather than safety or shatterproof glass. Defendant 215 East 68th Street was and is responsible for the installation of the glass.

Plaintiff entered onto the terrace through the open door. Thereafter, someone, without notice to plaintiff, closed the glass door. Subsequently, plaintiff attempted to re-

enter the apartment through the doorway, reasonably believing the glass panel was opened because of the illusion of space. Plaintiff came into contact with the closed glass door which shattered, resulting in severe lacerations and permanent scarring to plaintiff's limbs. In addition, plaintiff suffered great mental anguish, pain and suffering.

Plaintiff, Renee Kalscheur, was a budding model at the time of this accident, just beginning her career. She was registered for employment through the Eileen Ford Modelling Agency. By reason of the injuries sustained by plaintiff she had to give up her modelling career resulting in a great financial loss and further mental distress.

- B. Contention of Defendants, Jack Rounick and Lois Rounick
- 1. The jurisdiction in this case is based on diversity of citizenship. Defendant Rounick disputes that the \$10,000 jurisdictional amount has been met.
- 2. Defendants Rounick have an application pending under Rules 13 and 15 F R C P, seeking to file an amended answer to assert a claim against the co-defendant 215 East 68th Street, Inc., based on the theory of *Dole v. Dow*, 20 N. Y. 2d 143.
- 3. The plaintiff, a 23 year old girl, on July 10, 1968, was, in effect, a member of the family of the defendants Jack and Lois Rounick. Mrs. Rounick is her sister. Having finished her first year of college in June, 1968, the plaintiff moved into her sister's apartment at 215 East 68th Street, New York City, with Mr. and Mrs. Rounick. She intended to remain there for the summer while she attempted to get work in the city as a model. She was given a key to the apartment, enabling her access at her will. The plaintiff had spent a number of weekends during her prior college year in her sister's apartment, and hence had familiarity with it.

Two weeks prior to July 10, 1968, she had registered with a model agency and was taking courses there, hoping to obtain jobs as a model. At the time of her accident, she had not done so.

Leading from the dining room to an outside terrace of the Rounick apartment were two six foot wide glass doors, one of which was stationary while the other slid from left to right in a track, permitting access to the terrace.

Some time during the evening of July 10, 1968, the plaintiff, accompanied by two young men, went out on the terrace. The terrace surface was approximately four inches lower than the dining room floor. The Rounicks were not home. By means of a small handle, the plaintiff opened the door leading to the terrace enough to allow them to go out on the terrace, which was unlighted. The terace was approximately 15 to 18 feet long and about 5 to 6 feet wide.

After standing with the boys near the terrace railing opposite the doors for about five minutes, the plaintiff turned and hurried to get back into the dining room. Apparently someone had pulled the door closed, since the plaintiff went through the glass door, sustaining cuts in her two small fingers and both knees.

The plaintiff apparently hit the door with sufficient speed that, although she shattered it and went through it, she was still standing up when she got into the dining room.

The defendants will contend that the cause of the plaintiff's accident was her complete lack of due care with reference to a condition which was obvious and of which she had full knowledge.

The issues to be tried with the consent and agreement of the parties are:

1. What was plaintiff's legal status vis-à-vis the defendants Rounick and the defendant 215 East 68th Street, Inc.?

- 2. What duty did the defendants owe the plaintiff?
- 3. Did the defendants breach their respective duties?
- 4. Was the plaintiff guilty of contributory negligence?
- 5. What damages, if any, did the plaintiff sustain?
- C. Contention of Defendant, 215 East 68th Street, Inc.

Defendant 215 East 68th Street, Inc. contends that it was the owner of the apartment building located at 215 East 68th Street, New York, New York, and that defendants Jack Rounick and Lois Rounick were tenants and residents of an apartment in said building pursuant to a written lease. The Rounick's apartment had a patio, and access to that patio from the living room was by means of a glass patio door. At the time of the incident complained of herein, the apartment, patio and patio door was under the exclusive care, custody and control of the occupants of said apartment.*

That on or about and prior to July 10, 1968, plaintiff Renee Kalscheur had on many occasions visited, stayed in, and occupied that apartment with the permission and consent of defendants Jack Rounick and Lois Rounick. That on or about July 10, 1968, while plaintiff was occupying that apartment, she was entertaining her own guests therein, and she had care, custody and control of the patio door.

Defendant 215 East 68th Street, Inc. further contends that it was not negligent, that the patio door was not defective and that it was in conformity with the statutes, codes and regulations in effect at the time of its installation and at the time of the accident.

Such statutes, codes and regulations did not and do not require that patio doors in apartments or private

This defendant was a lessor out of possession and not liable for injury resulting from condition of the demised premises since liability is an incident of occupation and control.

dwellings be of safety or shatterproof glass. Similarly, such doors are not required to be marked so as to avoid an illusion of space. The patio door was properly constructed and maintained, and did not give an illusion of space. The patio door did not constitute a trap or place of hidden danger; the plaintiff knew of the presence of the glass door before the accident; and that, therefore, the building owners had no duty to warn her. Further, the defendant had no notice prior to the event complained of herein that an illusion of space was created.

Defendant, 215 East 68th Street, Inc., further contends that the plaintiff was contributorily negligent in that she did not see that which by the proper use of her senses she might have seen.

II. Exhibits

- A. Plaintiff's Exhibits
 - 1. Photographs of plaintiff
 - 2. Photographs of doors
 - 3. Hospital records and bill
 - 4. Physicians' bills
 - 5. Records of Anton Laub
- B. Exhibits of Defendants, Jack Rounick and Lois Rounick
 - 1. Lease with 215 East 68th Street, Inc.
 - 2. Lenox Hill Hospital record
- C. Exhibits of Defendant, 215 East 68th Street, Inc.
 - Lease to apartment 20-S in effect on July 10, 1968
 - 2. Records of 215 East 68th Street, Inc.

- 3. Records of Rudin Management Company, Inc.
- 4. Records of Emery Roth & Sons
- 5. Photographs

The foregoing lists of exhibits are not intended to include exhibits for the purpose of impeachment. All parties reserve the right to offer other exhibits as they may become relevant or necessary during the trial of this action, and any item offered as an exhibit or for identification by the other parties herein.

III. Witnesses

A. Plaintiff's Witnesses

- 1. Renee Kalscheur
- 2. Michael Wright
- 3. Michael Kelly
- 4. Dr. S. Jerome Dickinson
- 5. Dr. Frederick S. Dick
- 6. Joseph Petrellis
- 7. Dr. Albert Zucker
- 8. Dr. Kenneth Kook
- 9. Records of Lenox Hospital
- 10. Dr. Macentosh
- 11. Dr. Howard Bellin
- 12. Eileen Ford
- 13. Representative of Eileen Ford and the Ford Modelling Agency
- 14. Representative of Anton Laub

- 15. Jack Rounick
- 16. Lois Rounick
- 17. Karen Davis
- 18. Alfred E. Baccini
- 19. John Flynn
- 20. Sandra Olivia.

Plaintiff reserves the right to call as plaintiff's witnesses those listed by the other parties under III B & C.

- B. Witnesses of Defendants, Jack Rounick and Lois Rounick
 - 1. The plaintiff Renee Kalscheur
 - 2. Mr. and Mrs. Jack Rounick

C. Witnesses of Defendant, 215 East 68th Street, Inc.

Defendant, 215 East 68th Street, Inc., anticipates that its witnesses, in addition to any required to get its exhibits into evidence as well as those listed by the other parties, will be:

Fact Witnesses

- 1. Jack Rudin
- 2. Milton Lewin
- 3. John Nikissher
- 4. Timothy Flavin
- 5. John Conway
- 6. E. Shaska

Expert Witnesses

1. Vincent Lodico, M. D.

- 2. Architect and/or employee of Emery Roth & Sons, not yet designated
- 3. Expert not yet designated
- 4. Peter Morfopalous.

All parties reserve the right to call additional witnesses between now and the time of trial by the filing of additional pre-trial memorandum as provided by the Rules of this Court.

IV. Amendment

Plaintiff will ask leave of court to increase the ad damnum clause to read \$500,000.00 damages claimed by Renee Kalscheur.

KREMER, KRIMSKY & LUTERMAN, P. C.

By Martin M. Krimsky

Attorney for Plaintiff

DANIEL J. COUGHLIN, ESQUIRE

By George J. Conway Attorney for Defendants Jack and Lois Rounick

McLAUGHLIN, FISCELLA & GERVAIS

By James M. O'Donnell

Attorney for Defendant

215 East 68th Street, Inc.

Excerpts From Transcript.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

Before:

Hon. William C. Conner, District Judge.

[SAME TITLE.]

Before:

March 18, 19, 20, 21, 1974

New York, March 18, 1974 10:00 a.m.

Appearances:

Norman J. Landau, Esq., Attorney for Plaintiffs, By: Kramer, Krinsky & Luterman, Esqs., Trial Counsel, By: Martin M. Krimsky, Esq., Mark S. Levy, Esq., of Counsel.

Daniel J. Coughlin, Esq., Attorney for Defendants Rounick, By: George J. Conway, Esq., of Counsel.

McLaughlin, Fiscella & Gervais, Attorney for Defendant 215 East 68th Street, Inc., By: James M. O'Donnell, Esq., of Counsel.

(2) The Court: Let the record show that Mr. Martin Krimsky and Mr. Mark S. Levy of Philadelphia have been admitted *pro hac vice* to represent the plaintiff in this case.

I understand you have a motion, Mr. Krimsky. Mr. Krimsky: The motion with regard to—

The Court: To amendment of the ad damnum clause? Mr. Krimsky: I was going to do that out of the pres-

ence of the jury, your Honor.

Excerpts From Transcript

The Court: Let's say that you have made a motion and I have granted it to amend the ad damnum clause.

Mr. Krimsky: I would respectfully submit to your Honor's consideration the *voir dire* questions.

The Court: You may call the jury.

(A jury was duly impaneled and sworn.)

(Recess.)

(In open court; jury present.)

The Court: I am going to give you some preliminary instructions before we start receiving the evidence in the case so that as the evidence goes in it perhaps will have a little more meaning for you. At the close of the case I will give you your final instructions or so-called charge, will explain the law which applies to the case. For the present, though, suffice it to say that I have already told you, this is an action to recover damages allegedly sustained by (3) Miss Renee Kalschuer by virtue of having walked into the glass door in the apartment which is owned by the defendant 215 East 68 Street and is leased to her sister and brother-in-law, the other defendants, Jack Rounick and Lois Rounick.

The one who brings the lawsuit is called the plaintiff. The one against whom it is brought is the defendant. So the plaintiff here is Renee Kalschuer and her mother and father. Her mother and father are plaintiffs in the case because of the amount that they spent for her medical and hospital bills before she became twenty-one. She is now twenty-one and she is now personally a plaintiff. At the time the suit was originally brought it was brought by her mother and father on her behalf as a minor child.

Excerpts From Transcript

The case begins by opening statements from each of the two attorneys, or, in this case, three attorneys. The attorney for the plaintiff and the attorney for each of the two sets of defendants. The attorney for the plaintiff almost always makes an opening statement. The defendants' attorneys don't have to make an opening statement at all, or if he wishes he can defer his opening statement until the beginning of the defendants' case. Since we have two sets of defendants here, Jack and Lois Rounick and 215 East 68th Street, Inc., we have two attorneys representing defendants and each can make an opening statement on behalf of his client or clients (4) if he wishes or he can defer it until the beginning of the defendants' case or he doesn't have to make an opening statement at all.

In the opening statements counsel will tell you what they intend to try to prove, that is, what they hope the evidence will show. The statements of counsel are not evidence in the case. They are merely a prediction, a hopeful prediction of what the evidence will show on behalf of their clients. But you are not to pay any attention to the statements as evidence per se, but only to guide you in listening to the evidence as it actually comes in.

The evidence will consist of the testimony of the witnesses on the stand and the exhibits that are introduced in evidence, plus any portions of depositions. A deposition is an examination of a witness before trial, taken down by a notary public—before a court reporter and transcribed, and portions of the depositions may be read into evidence and they will be part of the evidence that you could consider if any such portions are in fact read.

During the course of the trial the counsel may object to evidence that is offered either from the witness stand or by way of documentary exhibits, and I will be called upon to rule on the objections, that is, to rule whether

Excerpts From Transcript

or not the evidence that is objected to is or is not admissible. (5) You should not consider anything that the counsel say in their arguments in support of the objection or anything that I may say in ruling upon the objections or the nature of my ruling as an indication with respect to the merits of the case. These are strictly legal matters that you don't need to be concerned with. You should limit your consideration to the evidence that actually goes in. If there is an objection to testimony that has already been given and a motion to strike that testimony, and if I grant the motion to strike the testimony, you must ignore that testimony which has been stricken in your consideration of the case. It is out of the case for all purposes and you should dismiss it completely from your minds.

At the conclusion of the case, as I say, we will have summations from the attorneys. The defendants' attorneys will sum up first and then the plaintiffs' attorney will sum up last, having the right to open and to close the arguments on behalf of the plaintiffs. Again, the statements that will be made by the counsel in their summations are not evidence. They are merely a marshaling of the evidence or a summation or summary of the evidence that has gone in to aid you in your deliberations.

After the summations I will give you my final charge in which I will explain the law which applies to the evidence that has been adduced in the case. You are required (6) to accept and follow the instructions that I give you to the applicable law, whether you agree with the law or whether you don't, that is not your function. Your function is to decide the facts and to apply to the facts which you find the law as I explain it to you in the charge.

You should not discuss the case with your other jurors or with anyone else until the case is completely over and

you have gone to the jury room for your final delibera-So during your recess, during the overnight recesses, if we go for an additional day or more, you should not discuss the case with your families, with your friends or even with other jurors. Wait until all the case is over and all the evidence is in and then you can consider it all together. Don't try to form a conclusion or opinion as the case goes in, because the first evidence may be contradicted or may be explained by later evidence. wait until it is all in before you form your conclusion.

I believe that is all I need to say to you by way of preliminary instruction. I may give you some supplemental instructions on some particular points as the evidence goes in.

Now we will have the opening from the attorneys for the plaintiffs.

The Court: I instruct the jury again that the statements that counsel have made are not evidence. They are only an indication of what counsel hope the evidence will show. The evidence will be forthcoming very shortly from the witnesses on the stand and from the exhibits and depositions and from the answers to interrogatories that will be introduced.

Are you ready to call your first witness, Mr. Krimsky? Mr. Krimsky: Yes, your Honor. I call the defendant Lois Rounick.

LOIS ROUNICK, called as a witness by the Plaintiffs, was duly sworn and testified as follows:

> Mr. Krimsky: If your Honor please, I am calling this witness on behalf of plaintiff as on cross examination. It might be of cross examination.

The Court: That remains to be seen.

Mr. Conway: I don't understand this procedure, your Honor. I don't understand what Mr. Krimsky is trying (26) to do here.

The Court: I think he wants to examine this witness as an adversary witness.

Mr. Krimsky: That's right, your Honor.

The Court: Even though she is the sister of the plaintiff.

Mr. Krimsky: She is a defendant.

The Court: That status as an adversary witness hasn't been established yet, merely because she is a defendant. I am reserving decision as to whether or not she is in fact an adversary witness.

Mr. Conway: I don't understand. Is Mr. Krimsky going to ask questions or is he presenting her for us to ask questions?

The Court: He is going to ask questions. The only question raised is whether he is going to be permitted to ask questions.

Mr. Krimsky: If your Honor please, I don't mean to plead ignorance, but I was under the impression that the law provides that a defendant is an adversary witness and I can call a defendant as under cross examination.

The Court: Under ordinary circumstances, that is correct. But this is not an ordinary circumstance and I have not yet made a decision as to whether she is in fact an (27) adversary witness.

Let me see counsel at the side bar.

(At the side bar.)

The Court: Are Jack and Lois Rounick insured? Do they have liability insurance?

Mr. Conway: Yes, your Honor.

The Court: I take it that you are representing the insurer?

Mr. Conway: Well, I am in the background. I am representing here, too. I mean, my loyalty is obviously to her.

The Court: What is the amount of the insurance policy, the face value?

Mr. Conway: I have no idea.

Mr. Krimsky: I was led to believe that it was only \$100,000.

The Court: I think under the circumstances you should not treat her as an adversary witness. I think in view of the fact that the plaintiff is her sister and in further view of the fact that she is insured in an amount which is likely to cover any recovery, that she should be treated like any other witness. You should examine her without asking leading questions or without attempting to impeach her in any way.

(28) Mr. Krimsky: The purpose of my testimony is not to impeach her, but to examine as to get from her—incidentally, your Honor, the claim here, and I think your Honor permitted the ad damnum clause to be amended on that \$500.000—

The Court: At the time I did that I said it seemed to me to be a more or less immaterial matter.

Mr. Krimsky: The testimony of Eileen Ford that she would have earned \$50,000 or \$60,000 a year for ten years certainly exposes the defendant to a far greater than any coverage that she might have.

The Court: Whether or not the plaintiff would actually endorse any judgment about \$100,000 against her own sister is another matter. So I am going to stand on my ruling. I think the advantage of interrogating her as an adversary witness isn't all that great. I think you ought to proceed and examine her like any other witness.

Mr. Conway: Since we have on here the increase of the *ad damnum*, I'd like to register my objection to that increase.

Mr. O'Donnell: I join in that objection, sir.

The Court: Your objections are noted. I will permit the amendment of the ad damnum clause.

Mr. Krimsky: Excuse me. Will your Honor permit argument later in the trial as to whether the regulations and (29) the law, the statute, applies in the particular case?

The Court: We have had argument already and for the record I have indicated to you my present disposition to rule that the section of the building code relating to glass doors in public buildings does not apply here, notwithstanding the fact that there is another section which defines public buildings as including apartment houses. I am ruling tentatively as a matter of law that an apartment that has been let to a tenant is no longer a public building. If you want to supply authorities on that, I have already indicated to you that I would receive those authorities.

Mr. Krimsky: This has to do with safety, and I just wanted to point out to your Honor just briefly now and later try to support my point of view, that the state legislature, building ordinance or safety codes or what have you, has the right to legislate as to what may be for the health, safety and welfare of the constituents within the apartment house itself.

The Court: I am not disputing that. I am saying that they have not ruled that you cannot have an unmarked glass door in a private apartment. I think we need say nothing further at this point. If you have any authorities to the contrary, I will be glad to receive them prior to the charge.

(30) Mr. Krimsky: You noted that the violation we are claiming is in the building code, it is Section 241(b) of the Labor Act.

The Court: I understand that. I consider no part of the labor law which relates to the safety of public buildings.

(In open court.)

Direct Examination by Mr. Krimsky:

- Q. Mrs. Rounick, would you state your full name, please? A. Lois Rounick.
 - Q. Where do you reside? A. 251 East 68th Street.
 - Q. Presently, with whom do you reside? A. My son.
 - Q. Are you presently married? A. No.
 - Q. To whom were you married? A. Jack Rounick.
 - Q. Is that the father of your son? A. Yes.
 - Q. When were you married? A. In 1966, July.
- Q. At that time, incidentally, where was Renee living? (31) A. I think she was living in Wisconsin at that point. That was before school.
- Q. So that in 1966 where did you reside and with whom? A. I was living with my husband at 215 East 68th Street.
- Q. When I say Renee, you understand that Renee is the plaintiff in this case? A. Yes.
 - Q. She is your sister? A. Yes.
- Q. Prior to July of 1966, did you live at that address? A. No. Not before I was married.
- Q. So you have since July of 1966, you have been living there? A. Yes.
- Q. And at that time Renee lived in Wisconsin? A. Yes.
- Q. Would you tell us, describe if you will for his Honor and the members of the jury, the situation with regard to your apartment house, to the apartment, with regard to the physical setup.

Mr. Conway: Your Honor, I think this is irrelevant, the rest of the apartment. We are only interested in one section.

Mr. O'Donnell: I object to the form.

(32) The Court: I think if the answer is brief it may be received.

Mr. O'Donnell: Your Honor, I respectfully object to the form of the question.

The Court: Read the question again-

Mr. Krimsky: I will withdraw the question and rephrase it, to save time.

- Q. What floor was your apartment on? A. 20.
- Q. What was the apartment number? A. 20-S.
- Q. Is that the top floor? A. Yes.
- Q. How many apartments are in that apartment building? A. I'd say about 500. I could be wrong.
- Q. What was the size of your apartment? A. Five rooms. Two bedrooms, living room, dining room, kitchen.
 - Q. Was there also a terrace? A. Yes.
- Q. Where was the terrace located? A. Off the dining room.
- Q. What separated the dining room from the terrace? A. Glass doors.
- (33) Q. What was the size, if you know, of those glass doors? A. 5 by S, approximately, I would say.
 - Q. 5 feet by 8 feet? A. Yes.
- Q. How many were there? A. There were two. One wall of the dining room, you might say, is glass. In other words, it is the whole area.
- Q. Before I get to that, Mrs. Rounick, just to digress for a moment, when Renee was in Wisconsin, did she go to high school in Wisconsin? A. Yes.
- Q. Where did she go after high school? A. Philadelphia, Harcum Junior College.

(Plaintiff's Exhibits 1 through 4 marked for identification.)

- Q. Mrs. Rounick, from the time that you moved into that house until July, 1968, did the condition of the doors remain the same? A. Yes.
- Q. Mrs. Rounick, I show you what is marked Plaintiff's Exhibit 1 for identification and ask if you could identify what that is. A. It is the dining area with the terrace.
 - Q. Of which apartment? (34) A. My apartment.
 - Q. Is that the way it was in 1968? A. Yes.
 - Q. 1967 and '66 when you were there? A. Yes.
- Q. Does that substantially represent that particular portion that it shows? A. Yes.

Mr. O'Donnell: Your Honor, I would ask that the photograph not be shown to the jury until it is properly marked in evidence.

The Court: Are you going to offer it now, or are you going to wait and offer them as a group?

Mr. Krimsky: I was going to wait and offer them as a group.

The Court: All right.

- Q. I show you Plaintiff's Exhibit 2 and ask you what that is. A. It is the same window.
 - Q. A photograph; is that correct? A. Yes.
 - Q. Of the same window, same area? A. Yes.
 - Q. Taken at a slightly different angle? (35) A. Yes.
- Q. Does that likewise represent substantially with accuracy the condition of that wall as it was in 1968 at the time of this accident? A. Yes.
- Q. I show you Plaintiff's Exhibit 3 and ask you if you can identify what that is? A. It is the same door, apparently open.
 - Q. That is the left-hand door; is that correct? A. Yes.

- Q. And Plaintiff's Exhibit 4? A. The entrance, it is looking at the dining room from the outside, from the terrace.
- Q. Looking at the dining room from the terrace? A. Yes.

The Court: With the door open or closed?

The Witness: I don't know. I really don't know if it is opened or closed.

The Court: It seems to be opened.

- Q. Does that substantially represent the condition of the building as it was at that time, this particular area? A. Yes.
- Q. We are referring now to Plaintiff's Exhibit 4 and likewise for all the rest of the photographs? (36) A. Yes.

Mr. Krimsky: I offer Plaintiff's Exhibits 1 through 4 in evidence, your Honor.

Mr. O'Donnell: May we see them?

The Court: Yes. Why don't you come up and look at them. They are pretty bulky.

(Pause.)

Mr. Conway: May I ask the witness a few questions?

The Court: Yes.

By Mr. Conway:

- Q. Were you in the apartment when these photographs were taken? A. I honestly don't remember. Quite possibly.
- Q. In other words, Renee still has a key to your apartment so she can come and go when she wants?

Mr. Krimsky: Your Honor, we are getting far afield. What does that have to do with these photographs?

The Court: I think it is relevant at least insofar as how the photographs were made, et cetera. Insofar as the key is concerned, that question is irrelevant and I am striking it.

Mr. Conway: I will withdraw it, sir. It will come out later, anyway.

- Q. But you have no remembrance when these photographs (37) were taken or whether you were there at the time? A. I can tell you, they were taken quite some time ago because I have changed the floor in the apartment, so I know they were taken in—
 - Q. I am asking you about when the actual time-

The Court: That's what she is trying to give you, because of the condition of the floor.

A. I can't say what day it was. I don't recall seven years ago or six years ago if I happened to be in the apartment at that time. I did have people working for me. There was always someone in the apartment most generally, except in the summer.

Q. Are you saying that you don't know whether you were there when the photographs were taken or not? A. I don't, no.

Q. Do you know how the photographer got in? A. As I said, I had a maid in the apartment, plus there are times when I left the apartment that the superintendent can leave someone in if I give him instructions.

Q. Did you leave instructions for the photographer to come in there? A. No, I don't think so.

Mr. Conway: Thank you.

The Court: Is there an objection to the exhibits?

(38) Mr. O'Donnell: Yes, your Honor. I object to the photographs with respect to the one marked Plaintiff's Exhibit 2 for identification. I will object to

it because the area in here is not definitive and does not fairly and truly represent the condition of the windows at the time, indicating the right side of the photo—

The Court: That is the left side of the photo as you look at it from the front of it?

Mr. O'Donnell: Yes, sir. The left side, as you stand behind it. I will make the same objection with respect to No. 1 for identification.

The Court: I overrule the objection and receive the exhibits for what they show.

Mr. Conway: I press the objection, your Honor, because this accident presumably happened in the nighttime and these pictures are taken in the day-time.

The Court: I understand. I think that goes to the weight of the exhibits and not to their admissibility. That is a matter which you can argue in your summation.

(Plaintiff's Exhibits 1 through 4 received in evidence.)

Mr. Krimsky: May I now display these to the jury, your Honor?

The Court: You may.

(39) (Pause.)

Mr. Krimsky: For the record, I am showing the photo marked P-1.

(Pause.)

Mr. Krimsky: This is P-2.

(Pause.)

Mr. Krimsky: This is P-3.

(Pause.)

Mr. Krimsky: And P-4.

(Pause.)

Mr. Krimsky: P-4 has been described as having been taken from the terrace facing into the dining

room. All the others are from the dining room facing out.

By Mr. Krimsky:

- Q. Mr. Rounick, were the door frames that appear in these photos the same as they were at the time of the accident? A. Yes.
- Q. Was there anything on the windows at all or the doors at the time of the accident? A. I don't understand the question.
 - Q. Were there any markings on the glass? A. No.
- Q. Which door was movable? A. The door on the left. (40) Q. As you are looking at the photographs? A. As you are facing the door, it is the door on the left.

The Court: As you are standing in the dining room looking towards the terrace, it is the door on the left? The Witness: Yes.

- Q. When the door is open as far as it could go, how far does it go? A. It opens the entire half of the wall, of the glass enclosure. So that one frame fits—
 - Q. Into another? A. Yes.
- Q. So that one door is completely in front of or in back of the other door? A. Yes.
- Q. When it is fully opening. Is there a lock on the doors? A. Yes.
 - Q. Where is that lock? A. It is in the center.
- Q. On which door? A. It is on the left door, the one that moves.
- Q. When the left door moves, when you move the left door and it slides over to the right, does it move in front of (41) or behind the stationary door? A. I think in front, I'm not sure.
- Q. In front, meaning when you are in the dining room?

 A. Right.

Q. It would slide over to that door, the movable door would be the door closest to the dining room when sliding over? A. Yes.

Q. Is there any light on the terrace? A. No.

Q. Is there any light in the dining room? A. Yes.

Q. When I say "is there," I want you to know that I am asking questions with regard to the condition of the dining room, the condition of the premises at the time of this accident.

You have drapes exhibited there in these photographs. Was that the condition, you said that that was the condition of the room as it appeared at the time of the accident. Is that the condition of the room now? A. No.

Mr. Conway: That is irrelevant, your Honor, what the condition of the room is now.

The Court: Sustained.

Q. You said that there's no light on the terrace, there (42) was a light in the dining room. What was the dining room illuminated by, what kind of light? A. A chandelier.

Q. Were there any other lights that shone on the terrace, other than the light in the dining room? A. No.

The Court: That is, there was no light on the terrace itself?

The Witness: No.

Q. Had you prior to 1968 been out on that terrace at night? A. Yes.

Q. Would you explain to his Honor and the members of the jury just what conditions were like with regard to the light and the doors?

Mr. O'Donnell: I object to the form of the question.

The Court: I will overrule the objection.

A. If I am on the terrace, what are the conditions? Is that the question?

Q. Withdrawn.

What did the doors look like at night when you were on the terrace, before this accident, and the chandelier was on in the dining room, chandelier light was on, what did the windows or glass doors give an appearance of?

(43) Mr. Conway: Objection.Mr. O'Donnell: Objection.The Court: Overruled.

A. I would have to say that being on a dark terrace at night with lights on inside, one would certainly have to, you know, walk back and forth with a certain amount of caution. They are certainly not that easy to see.

Q. What's not that easy to see?

Mr. O'Donnell: Objection. Calls for the operation of the witness' mind and not the operation of the mind of the plaintiff in this case at the time exactly, at the exact time of the accident.

The Court: I think she should confine herself to the physical evidence and not her state of mind. In other words, what is the physical appearance of the glass when viewed under those conditions.

Q. Before this accident.

The Court: At the time of the accident.

Mr. Krimsky: She wasn't there, your Honor. Immediately before.

The Court: Immediately before.

Q. At or about the time of the accident, prior thereto. A. As I said, glass doors—

Q. I am talking about these glass doors. (44) A. These glass doors were difficult to see from the outside.

Q. In what way were they difficult to see? A. Well, if you are standing in the dark and you are looking into a brightened room, unless you are totally aware of glass in front of you, you cannot see it. There is no reflection.

Q. Is that how it appeared to you prior to this accident?

Mr. O'Donnell: Objection. The Court: Sustained.

The Witness: Am I to answer the question? The Court: No.

Q. Prior to July 10, 1968, had anybody else at nighttime on that terrace, with regard to these particular doors, had anybody had an accident?

Mr. Conway: I object to that.

Mr. O'Donnell: Objection.

The Court: If she observed the accident, I think she may testify.

Q. Were you present at the time that an incident or accident occurred, at any time prior to July 10, 1968?

Mr. Conway: I object to that, your Honor, unless we have some similarity of circumstances here.

(45) Mr. O'Donnell: I will join in that.

The Court: I assume this is going to be tied to a similar situation. If it isn't, obviously it is objectionable.

Mr. Krimsky: Yes, your Honor.

Q. We are talking about at night, when there was no light on the terrace and there was a light in the dining room prior to the incident that Renee injured herself, might that incident, had anybody else injured themselves on that door?

Mr. O'Donnell: Objection.

The Court: Had she observed anybody injure himself.

Q. Was there an incident? A. Yes, as a matter of fact my husband—

Q. Before we get to that, how many times did something occur like that?

The Court: Where she was present?
Mr. Krimsky: Yes, I understand that, your Honor.

Q. Do you understand? A. Yes.

Q. When you personally observed these things-

Mr. O'Connell: I object to the form. The initial question was when something like that. That is ambiguous.

The Court: I assume he is going to qualify it. Up to now it has no relevance at all. It will have to be qualified, obviously.

(46) Go ahead.

A. I do recall my husband reprimanding me, as a matter of fact, because he did bump his head on the glass.

Mr. Conway: That is objected to. Move to strike.
The Court: Yes. The statement what her husband did by way of reprimand is stricken.

Institut tell us what were absented above.

Just tell us what you observed, please.

The Witness: He had been out on the terrace and I believe was coming back in and bumped his head, and actually he had stated to me at that point that this was the second time—

Q. Don't tell us what he said. A. He said, you know-

The Court: Don't tell us what he said. Just tell us what you saw. That's all that you are permitted to tell us. You are not permitted to tell us what he said.

A. Well, I did see him bump his—the top of his head, I believe it was.

Q. The forehead, against what? A. Against the door, the glass door.

Q. Which door was that? A. It was on the left side, also.

Q. Would you tell us when that occurred? A. It was sometime in September of 1967, after we had (47) come back from the country.

Q. When you say that he said something to you at that point, how soon after the incident that you observed him bump his head did he actually say something to you? A. Immediately.

Mr. Krimsky: Your Honor, I think that is admissible.

Q. What statement did Mr. Pounick make to you at that time?

Mr. Conway: Objection. Mr. O'Donnell: Objection.

The Court: Her husband is a party defendant and this is presumably part of the res gestae. It is not being accepted as proof of the truth of what he said but as a spontaneous exclamation at the time, and I will instruct the jury that this statement is not being accepted as proof of the truth of what Mr. Rounick said at the time.

Mr. O'Donnell: If I may have one further objection. Any statement by Defendant Rounick of course is not binding on Defendant 215 East 68th, Inc., therefore I object to it on those grounds.

The Court: I will instruct the jury further that nothing Mr. Rounick said is binding on the other defendant, 215 East 68th Street.

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Lois Rounick, for Plaintiffs, Direct

Mr. Krimsky: If your Honor please, a res gestae (48) statement is an exception to the hearsay rule and is permitted to show the truth of what that person said. It is one of the exceptions. I say that most humbly, your Honor.

The Court: I will weigh that and take that into consideration in my final charge to the jury. For the moment, she may go ahead and testify to what the statement was.

- Q. Mrs. Rounick, I don't know whether I questioned you on this. Are you presently married to Jack Rounick? A. No.
- Q. Where does Jack Rounick live? A. He lives in Manhattan.
- Q. What did he say when this took place? A. He asked me to please do something about the doors so that this wouldn't happen again.
- Q. Did you in fact do anything about the doors? A. Well, as a matter of fact—
 - Q. When did this happen? A. The date, September.
 - Q. September of what year? A. '67.
- Q. Was there anyone else in the apartment at the time? A. No, I don't think so, no.
- Q. At that time what did you do as a result of this incident?
- Mr. Conway: Objected to.
 Mr. O'Donnell: Objected to.
 The Court: Read the question, please.
 (Question read.)
 - Q. The incident in which your husband-

The Court: That is awfully broad. Couldn't you narrow that down a little?

Mr. Krimsky: I can, but I don't want to be accused of leading the witness.

- Q. Did you notify anybody with regard to this situation? A. Yes, as a matter of fact. I called the next morning maintenance and asked them if there was anything they could do to make the doors more visible, to avoid that kind of situation.
- Q. When you say called maintenance, maintenance of the building, the maintenance department of the building that you were in? A. Yes.
 - Q. Is that correct? A. Yes.
- Q. To whom did you speak there? A. At that time there was a gentleman named Archie who was in charge of maintenance that I usually spoke to with regard to my individual requests.
- (50) Mr. O'Donnell: At this time I move that this testimony be stricken. It is not showing that she spoke to anybody in a managerial capacity and therefore there would be not notice to the management of the company.

The Court: Objection overruled.

- Q. What did he say to you? A. I asked him for something for the windows and he suggested decals, and I said, I asked him to get them, which he said he would do.
 - Q. Were you provided with any decals? A. No.
- Q. Was there any other incident where any other individual before this accident had an incident relating to similar circumstances? A. There was one other situation when there was a party in the apartment, a group of people. That was in May, I think, before we went to the country. It was around the time of my birthday, it was a birthday party. It was before my birthday. My birthday is June 8. It was sometime around the end of May.
- Q. What year was that? A. This was sometime in 1968.

Q. Would you please keep your voice up so this gentleman back here can hear. (51) A. I said that there was a party in the apartment in May. It was for my birthday in June, but to have the people there before going to the country it was a couple of weeks before that, I don't recall exactly when. And someone that evening also complained about—

Q. Don't tell us what the complaint was. Did you observe anything happen at that time? A. Yes.

Q. What did you observe? A. Did I observe? No. I did not observe it.

Q. Then you can't tell us about that.

But as a result of that incident, what did you do with regard to notifying anybody? A. Well, my husband again asked me to—

Q. You can't tell us what your husband asked you. Tell us what you did. To whom did you speak, et cetera. A. Because of someone complaining about a bump—

The Court: The statement about a complaint is stricken. The jury is instructed to disregard it. What did you do, if anything.

A. The next day I once again called maintenance and asked if they could do something to help me get decals that they promised, and why couldn't I go get them. And they said no, no, they would take care of it.

(52) Q. Mrs. Rounick, did anyone use the terrace during the evening, that you know of, when it was dark out and light inside, between September and May, in the evening, at nighttime, anyone go out on the terrace during those months from September of '67 to the time of this party in '68? A. You are saying during the winter, in other words, if anyone would go out? Generally, if it was cold—

Q. Do you know if anyone went out? A. No, I don't.

- Q. There came a time, you told us, that you left for the country; is that correct? A. Yes.
 - Q. In 1968? A. Yes.
- Q. Do you know about when that was? A. Usually it was at the beginning of the so-called summer season.
- Q. The beginning of the so-called summer season? A. Right.
- Q. When would that be? A. Usually the beginning of June.
- Q. What did you do with regard to the dining room, kitchen, et cetera? A. My husband, who of course was in the city during (53) the week, didn't eat in the apartment because there wasn't anyone there to cook for him, so usually that particular part of the apartment wasn't used very much, the dining room, kitchen.
- Q. So what did you do? A. I just kept the curtains closed and that was all I really did.
- Q. Did there come a time when Renee visited with you, or visited your apartment, in 1968? A. Yes. After she was finished with school she did come to New York and—
- Q. That was when? A. That was, I would say, the end of May, or whenever school was out. I don't exactly recall.
- Q. To refresh your recollection, didn't she first go home and then come back to New York?
 - Mr. O'Donnell: Objection. The question is leading.
 - A. I would expect so. I'm not sure.

The Court: Go ahead.

- A. I really don't know.
- Q. Did you ever tell Renee or warn Renee of the condition of the glass or the danger, or whatever? A. No.

Q. Prior to her accident, I am speaking about. (54)
A. No. I didn't.

Q. Can you tell us, Mrs. Rounick, whether or not prior to Renee's accident, you regarded this condition, these windows, as a dangerous condition?

Mr. Conway: Objected to. Mr. O'Donnell: I object.

The Court: That is clearly objectionable.

Q. Where were you at the time this accident happened? A. I was in East Hampton.

Q. Did the building maintenance have a key to your apartment, in 1967 and 1968? A. Yes, a master key.

Q. If you had any problem with regard to anything being wrong, such as a leaky faucet or something like that, any repair being necessary in the building, who would make those repairs?

Mr. O'Donnell: Objection.

The Court: I think the question is objectionable as you phrased it. You phrased it in a very hypothetical way, instead of in terms of actual experience.

Q. Did you ever, prior to this accident, during the years '67, '68, '66 when you were living there, was your apartment ever in need of any repairs? A. Frequently.

(55) Q. Who would make those repair. A. There were many people in the maintenance department and it could be one of, I would say six different men.

Q. But they were employed by whom? A. By the building.

Q. Which was 215 East 68th Street? A. Yes.

Q. You testified that you had called the maintenance department and you spoke to a man by the name of Archie. What was his position with regard to that maintenance

department? A. He was the gentleman that was in charge of maintenance, whatever his title was.

Q. Of the building that you were in; is that correct? A. Yes.

Q. In the conversation that you had, the second conversation after this May incident, you related a conversation in which you requested some decais or some markings for the door. Did Archie, or this supervisor of maintenance, did he advise you as to whether or not you could put the decals on?

Mr. O'Donnell: Objection. There has been no testimony who she spoke to the second time. She said somebody at maintenance.

The Court: Are you talking about the first conversation or the second?

(56) Mr. Krimsky: I will go to the second.

Q. To whom did you speak in the second conversation? A. I also spoke to Archie the second time, because in order to really get things done I always did speak to the man in charge, really.

Mr. Conway: Objection, your Honor.

Mr. O'Donnell: Objection, your Honor. May I ask that the witness not answer when an objection is raised.

The Court: Yes. Just confine your answers to the question that was asked. In that way you give the attorney the opportunity to object. If you go beyond the question, you get into areas that are beyond the objections.

(Record read.)

Mr. O'Donnell: From "because" on I move be stricken.

The Court: The portion after she stated she spoke to Archie on the second occasion may be stricken.

Q. On this second occasion that you spoke to Archie, what did you say to him and what did he say to you?

Mr. O'Donnell: Objection.
The Court: Overruled.

A. I brought up the point that he hadn't done what he had promised he would do many months prior and would it be all right for me to get decals to put on the windows myself, or was he going to do it, because at that point I was rather (57) irritated. He said no, no, no, he would take care of it and I should not do it myself.

Mr. Krimsky: I have no further questions, your Honor.

The Court: We are going to take our lunchtime break here. I want to caution the members of the jury again not to discuss the case with your fellow jurors or anyone else. You have heard only a very small part of the evidence and you shouldn't discuss it with anybody at all until all the evidence is in, you have heard the summations and I have charged you and you go into the jury room for your final deliberations.

(The jury left the courtroom.)

(Luncheon recess, 12:50 p.m.)

(58) Afternoon Session 2:10 p.m.

(In open court; jury present.)

LOIS ROUNICK, resumed the stand.

Mr. Krimsky: If your Honor please, may I see the original record?

The Court: The original record?

Mr. Krimsky: The original pleadings, I'm sorry. (Pause.)

Mr. Krimsky: Thank you, sir.

The Court: Are the defendants Jack Rounick and Lois Rounick ready to cross examine?

Mr. Conway: Yes, your Honor. Are the plaintiffs finished?

The Court: I presume so.

Mr. Krimsky: You are permitting counsel to cross examine this witness?

The Court: Yes.

Mr. Krimsky: Are you permitting him wider latitude than would ordinarily be permitted as if a defendant were called as on cross examination?

The Court: He will treat this witness like he would treat any other witness for the plaintiff.

Mr. Krimsky: May I have an exception, your Honor.

The Court: You may.

(59) Mr. Conway: Your Honor, I wonder, could we see the original photographs from which these were blown up?

The Court: Do you have the original photographs?

Mr. Krimsky: I do not, sir. The photographer does.

Cross Examination by Mr. Conway:

Q. Mrs. Rounick, you have, I gather, on occasion gone out on this terrace yourself, have you not? A. Yes.

Q. You have been out there in the evenings, too? A. Yes.

Q. What sort of a chandelier do you have in the dining room?

Mr. Krimsky: Excuse me, your Honor. Could we limit that to as of the time of this accident?
Mr. Conway: Yes, I'm sorry.

Q. What did you have there at the time of the accident in 1968? A. I think it was a brass chandelier with perhaps six lights on it.

Q. Did you have any wall sconces at all? A. No.

Q. Just the six-branch candelabra overhead? A. Yes. (60) Q. This room is fairly small, is it not, the dining room? A. I think the dimensions are approximately, I would say 9 by 12.

Q. The 9 is where the glass doors run across, as against the 12 feet? A. Yes.

Mr. Krimsky: Would you repeat the question?

Q. The dimensions of the dining room, you said, were about 9 by 12, the 9 being where the glass doors are, the 12 being the depth of it; is that correct? A. That is a guess.

Q. Obviously. A. It would be 10 by 15.

Mr. Krimsky: I think that is not correct, your Honor. I would ask that the witness hear the question carefully.

The Court: Apparently she heard the question and if you disagree with the answer you can bring that out on re-direct.

Q. In 1968, what did you have on the floor of the dining room? A. At that particular time the floor was a dark blue and green tile that had looked like ceramic. However, it was (61) tile.

Q. Did you have any carpeting on top of that? A. No,

no carpet.

Q. The floor was a tile and I assume a polished tile, was it? A. I don't understand your assumption, polished tile. It was perhaps cleaned and waxed.

Q. That's what I mean. It was cleaned and waxed and polished so that it looked shiny if one looked at it? A. I really don't know that it was shiny, I can't remember.

Q. If it was waxed, that would give it a shine, would it not? A. Yes.

Q. On the occasions when you had been out on the terrace and you looked into the dining room, would the light be lighted? A. Usually, yes.

Q. Did it cast a reflection on the glass doors, partic-

ularly the one that was stationary? A. No.

Q. It didn't reflect on the door at all? A. From outside you are talking about, or from being inside?

(62) Q. No, from the outside. A. Not that I recall.

Q. Outside was dark, wasn't it; you didn't have a light on the terrace, at least? A. No.

Q. So you had the chandelier and a piece of glass between it and the terrace? A. Yes.

Q. Didn't the light reflect on the stationary glass? A. I don't know; you know, I don't recall.

Q. Did the light reflect down on the polished floor?

A. I don't recall that, either. I would say no.

Q. As you go from the dining room out to the terrace, is that a level portion there or is it raised or is it depressed or what? A. It is raised.

Q. How far? A. About, I would say this high.

Q. This looks to be about six or seven inches, about seven or eight inches. A. I would say so.

Q. On top of that six or seven inch rise, was a polished piece of board, was there not? A. Yes.

(63) Q. Would the light not reflect on that piece of polished board?

Mr. Krimsky: Would it or did it-

A. I don't think so. You know.

Q. What kind of bulbs did you have in the dining room fixture? A. I would say a total of approximately 80 watts.

Q. In other words—15 watts apiece, 20 watts apiece? A. 20.

Q. 20 watts? A. Yes.

Q. And you had six of them? A. Yes.

Q. Did you have it on a rheostat? A. Yes.

Q. Was it usually turned down or turned up? A. For dining it was usually turned up.

Q. I gather you have seen it both turned up or down when you were on the terrace looking in? A. Yes.

Q. And on any of those occasions you never noticed a reflection on the glass door? A. No.

Q. And you never noticed a shiny reflection on that (64) shiny board on the step up? A. Absolutely not.

Q. This picture that is Exhibit 3, in the lower left-hand corner here, this is that board that appeared to be shiny, does it not? A. Yes.

Q. In other words, that board got waxed along with the floor; correct? A. Yes.

Q. And you never recall ever seeing the light reflected from that when you were on the outside; is that correct?

Mr. Krimsky: If your Honor please, that is not the question that counsel was asking the witness. He is arguing with the witness, first of all, and second of all, that is not the question. The ques-

tion was, did she see the reflection onto the glass from that shiny floor.

The Court: He is asking her now about the board onto the floor.

Mr. Krimsky: From the board onto the glass, that is what he said before.

Mr. Conway: No, I didn't. I asked her whether the lights reflected onto the glass. She said she didn't know. Now I asked her whether the light reflected onto that shiny board which was on top of that six or seven inch step.

(65) Q. Did you ever see that? A. I really don't re-

Q. All right. This step that you said measured six or seven inches, that was the same height as the terrace, wasn't it, or was it higher on the terrace? A. I would say that it could possibly be a little bit, the terrace could be lower than the level of the dining room floor. I'm not sure about that.

The Court: I thought that was the six or eight inches that you were talking about.

The Witness: It goes up. I think perhaps it is higher from the outside than it is from the inside. In other words, the terrace, the level of the terrace could possibly be an inch or two lower.

The Court: Lower than what?

The Witness: Than the dining room floor.

The Court: I thought you said it was six or eight inches lower.

The Witness: I'm saying that the outside part of the terrace, the surface, could possibly be an inch or so lower than the dining room surface floor.

The Court: Where is the six or eight inch step that you are talking about?

The Witness: That's in the middle. That's between (66) the two.

Mr. Krimsky: From the dining room there is a level above where the doors ride on and then down to the terrace.

The Court: That's what I thought all along, and I thought it was a six or eight inch step (handing).

You are talking about a step down from that shiny board into the dining room?

Mr. Conway: That's right.
The Court: I understand.

Q. So coming from the dining room out, one would step up some six or seven inches and then when you got on top of the board, and you would go down to the terrace, you went down about two inches further, making about eight or nine inches? A. Yes.

Q. Anyone coming in from the terrace had to watch their step in order to step up over this board to get into the dining room? A. Yes.

Mr. Krimsky: Objection, your Honor.

The Court: I think it is just a wrap-up of the testimony that the witness has already given. Over-ruled.

Mr. Krimsky: One had to step up, but to watch their step up is a different proposition.

(67) The Court: I thought he said one had to step up. I will sustain the objection.

Q. Coming from the dining room onto the terrace, one had to watch out for that eight or nine inch rise because they had to step over it, didn't they?

Mr. Krimsky: Objection. The Court: Sustained.

Q. Coming from the terrace into the dining room, did you have to step up over this eight or nine inch rise to get into the dining room? A. Yes.

Q. If you didn't, you would stub your toe, wouldn't you? A. Yes.

Mr. Conway: Thank you.

Cross Examination by Mr. O'Donnell:

Q. On this terrace, Mrs. Rounick, were there any chairs or tables on the terrace in June and July of 1968? A. No.

Q. At that time, in the period from July of 1966 when you first began to occupy the apartment as Mrs. Rounick, did you have maid service? A. I had a maid, yes.

(68) Q. Was she a live-in maid or was she by the day? A. She was a live-in.

Q. Was it her duty to polish the floors that were inquired about in prior questions by Mr. Conway? A. Yes.

Q. Was it also her duty to clean the windows in the apartment? A. Yes.

Q. Did she also clean this glass door to the terrace that you told us about? A. Yes.

Q. Did she clean that window and glass door from both sides, the terrace side and the apartment side? A. Yes.

Q. Would I take it to be true that you directed her, you yourself directed her to perform these duties? A. Yes.

Q. In the normal course of her job as your maid; is that right? A. Yes.

Q. Do you know what kind of polish she used to polish these glass windows to the terrace? A. The windows?

Q. Yes, glass doors to the terrace. (69) A. I would say Windex.

Q. Did you ever observe her doing that herself? A. Yes.

Q. Did you inspect her work after she did it? A. Well, I inspected all her work, yes.

Q. And she left these terrace doors, when she would complete her polishing of them, in a condition satisfactory to your practiced eye; is that correct? A. Yes.

Mr. Krimsky: Your Honor, I don't know that the words "polish them," you clean them with Windex, you don't polish them with Windex.

The Court: I think the question is proper. I think the jury will understand what is done when you use Windex on a window.

Q. Did you ever direct your maid to put any decal on that window prior to June of 1968? A. No, I didn't.

Q. Between the time that you moved into the apartment in July of 1966 and the time that something happened to your sister, did you change the decor of that apartment? Specifically, the dining room? A. Yes.

Q. Did you make a choice of fabrics for the window (70) drapes? A. Yes.

Q. And at that time did you also change the chandelier or the furniture in that room? A. The chandelier was the very last thing I changed in the room.

Q. When did you change that, ma'am? Before or after something happened to your sister? A. That was after that.

Q. You were on the 20th floor, I believe? A. Yes.

Q. Did you have a good view from that apartment through the patio doors, overlooking New York? A. Yes.

Q. Was that one of the reasons why the apartment was rented, because it had this panoramic view of the city of New York? A. I cannot answer that question. My husband rented the apartment before I moved in. Several years prior to that.

Q. Did you yourself enjoy that view, ma'am? A. Certainly.

Q. Did you enjoy it both, prior to 1968, both from the terrace and from inside the dining room? (71) A. Yes.

Q. Prior to June of 1968 your attorney in his opening said that you had drapes on a traverse rod over the door itself; is that correct? A. Yes.

Q. Were these operated by drawstrings? A. Yes.

Q. Did the drapes at that time, ma'am, did they open from the center to the sides or was it a single type of traverse rod that just opened in one direction? A. I think they opened from both sides to the center.

Q. So that when the drapes were opened, some portion opened from the center, some portion would be at the borders of the door to the terrace; is that correct? A. Not necessarily, no. I think they went—they pulled back, you know, to be flush with the wall.

Q. When they were drawn back to be flush with the wall, as you phrased it, how much of the wall would be visible as you would look from the dining room onto the terrace? A. Perhaps just an inch or maybe less.

Q. Would that be in a situation where the drapes were open to their fullest extent? A. Yes.

Q. Did you have any guard on the drapes or the (72) traverse rod to keep the drapes from opening all the way to the end of the traverse rod? A. I don't understand what you mean.

Q. Was there any guard that prevented the drapes from going all the way to the end of the traverse rod so that they would not blow out or be visible from the terrace when the drape was open? A. Not that I know of.

Q. Was that apartment air conditioned? A. Yes.

Q. In 1968? A. Yes.

Q. Was that an automatic air conditioner? A. Yes.

Q. In the sense that it would be central air conditioning? A. Yes.

Q. In June of 1968, prior to your going to the Hamptons, was it? A. Yes.

Q. Do you know what temperature that air conditioning was set for? A. I'm sorry, I don't.

Q. Did you set it yourself? A. No, I think that is something the building establishes. (73) You turn it on or you turn it off.

Q. Did you use that air conditioner prior to leaving for the Hamptons in June of 1968? A. I really don't recall the temperature at that particular time of that particular year, I'm sorry.

Q. You told us you spoke to somebody by the name of Archie in September of 1967; is that correct? A. Yes.

Q. Was that an oral conversation or did you notify him in writing? A. No, it was on the house telephone.

Q. Between September of 1967 and May of 1968 you just made that one phone call; is that right? A. No, that is not correct. I spoke to maintenance perhaps—

Q. I am talking about your conversation with Archie. After you spoke to him in—

Mr. Krimsky: Excuse me, your Honor.

The Court: Let her answer.

Did you have a conversation with Archie about this subject anytime from 1967, September, until the later conversation that you had in I believe May of 1968?

The Witness: No.

- Q. And then in May you spoke to Archie again? (74) A. Yes.
- Q. When for the first time did your sister come to visit you at the apartment after you began to occupy it in July of 1966? A. The first was at Thanksgiving, on her first vacation from school.
- Q. What year was that, ma'am? A. I believe that was 1967.
 - Q. This was in November of 1967? A. Yes.
- Q. At that time, ma'am, were you aware that your sister wore glasses? A. Yes.

- Q. That is for a nearsighted condition, isn't it? A. Yes.
- Q. At that time when she first came to your apartment did you give her a key to the apartment? A. No.
- Q. At that time when she first came to your apartment did you, because of her nearsightedness, did you call the door to the terrace to her attention? A. No.
- Q. When she came to your apartment back in November of 1967 did you take her out on that terrace to show her the view? (75) A. No.
- Q. Did you stay in the dining room and observe the view with her, do you remember? A. Yes, I would expect so.
- Q. During that vacation in 1967, how many days did she spend with you in your apartment? A. Possibly four.
- Q. And during that period of time did you have your drapes open? A. Most of the time, yes.
- Q. Would it be the normal course and the habit of your maintenance of your home, ma'am, to have your drapes open in the daytime? A. Yes.
- Q. This particular door that we are talking about, it had a center strip down the middle of the door, didn't it? A. Yes.

Mr. Krimsky: Excuse me, your Honor. The glass door, do you mean by that the sliding door or do you mean the whole wall?

The Court: I assume that he means the right edge of the left door and the left edge of the right door.

Q. I mean that portion right here, ma'am.

Mr. Krimsky: I don't know if the jury can see what (76) you are referring to.

Q. I will show it to the jury.

This portion that divides the stationary part of the glass and the sliding portion of the glass, that had a ver-

tical marking down the center; is that right? A. I think that is a reflection, isn't it? I don't recall any vertical marking down the center. That is the side of it, I believe.

Q. Did the stationary glass portion of the door have a frame? A. I guess it does.

Q. Is that the frame, ma'am, in the center of this both sliding portion and stationary portion of the door? A. Yes.

Mr. Conway: What is the number of the exhibit? Mr. O'Donnell: That is Exhibit 1.

Q. Can you tell us what the width of that frame is, ma'am?

Mr. Krimsky: Which one?

Mr. O'Donnell: The one I have been referring to in the center.

Mr. Krimsky: The width of the frame? The Court: Yes.

- Q. In the center. How many inches is that, now? (77)
 A. You are talking about the entire—
 - Q. Frame. A. The entire center-
 - Q. Center frame. A. Oh, three inches.
- Q. And that runs the entire height of the door; is that correct? A. Yes.
- Q. The portion of the door that slides has a handle on it so that you can pull it; is that correct? A. Yes.
- Q. That is a metal handle affixed to the frame of the door, isn't it? A. Yes.
- Q. And that is the frame nearest the wall; isn't that right? At least one half of the frame is near the wall? A. Yes.
- Q. What is the color of that handle? A. It is the same color as the frame, which is silver, would you call it.
- Q. When you were on the terrace looking in, ma'am, did you ever see the chandelier light reflecting off the frame of the door? A. I'm sorry, would you repeat that?

- (78) Q. Did you ever see the light from the chandelier reflecting off the white or light colored framework of the door? A. Are you talking about when I'm in the dining room?
 - Q. When you are outside. A. I really don't remember.
 - Q. You don't recall that at all? A. No.
- Q. When you are on the inside, did you see the chandelier light reflected off the handle of the door? A. I don't remember.
- Q. On the outside of this patio, do you remember you also had a handle affixed on the framework so you could open it; is that right? Wasn't this a handle on the door so you could open it from the outside after you had closed it behind you? A. I really don't recall.
- Q. You don't recall whether or not there is a handle on your own patio door, ma'am? A. No.
- Q. How long have you been occupying this apartment? A. Well, I think it's been about eight years, but I really don't go out there very often.
- Q. You don't take advantage of your patio? (79) A. When I go out on the terrace I very rarely lock the door to keep myself out there. If I go out, I come back in.
- Q. When you got out onto the patio after opening the door, it doesn't automatically lock behind you when you close the door, does it? A. No, but I—
 - Q. Your answer is no, isn't it? A. Yes.

Mr. Krimsky: Let her explain it.

Mr. O'Donnell: The question calls for a yes or no answer.

The Court: She can explain after giving a yes or no answer.

Mr. O'Donnell: I think the question asked requires a yes or no answer.

The Court: It requires a yes or no answer, but she is allowed to give any explanation she wants to give after answering yes or no, provided the explanation is responsive to the question.

Mr. Krimsky: Thank you, sir. Do we have an unanswered question?

Mr. O'Donnell: I don't think so.

Mr. Krimsky: She said no, and she started to answer something and counsel interrupted.

(80) The Court: Read the question back. (Question read.)

The Court: What do you want to add to that?
The Witness: I don't recall ever going out onto the terrace and closing the door.

Mr. O'Donnell: I move that that be stricken.

The Witness: If I went out onto the terrace, I usually went out briefly and came back.

The Court: It may stand.

Q. Are you telling us that you never took a chair out to your terrace and sat on the terrace to enjoy the sunshine and cool evening breeze? A. There was absolutely no sunshine on my terrace. A fraction of this amount of sun in the morning, perhaps.

Mr. Conway: Indicating about six inches.

The Witness: Very little.

I must say I tried it, but it just didn't work, so I didn't use it.

The Court: What side of the building is the terrace on?

The Witness: It faces north, doesn't it? Yes, it is north.

- Q. And you never spent more than a few minutes at any one time on that terrace, since 1966? (81) A. Absolutely not.
- Q. You told us that in November of 1967 your sister came to visit with you. Did she come there again after that November visit of 1967, and if so, when? A. I think

at the end of the school term she came for a short period of time.

Q. Did she come for any weekend holidays during the time that she was in school between November or Christmas of 1967? A. I really don't think so, no.

Q. Are you telling us that the next time she came to see you was in June of 1968? A. Yes.

Q. Did she stay with you during the Easter vacation from school in April of 1968? A. No.

Q. And you told us that for approximately a week or two prior to the time that something happened to your sister she was a resident in your apartment; is that right? A. Yes.

Q. And during that period of time-

Mr. Krimsky: If your Honor please, that is a legal conclusion. She was not a resident.

The Court: Read the question. (Question read.)

(82) The Court: I think it may stand.

Q. Did you give her a key to that apartment so that she could come and go at will? A. Yes.

Q. Did you also notify the building that your sister was now a resident of your apartment? A. Yes.

Q. And did you also tell them that your sister was a tenant in your apartment with you? A. My sister was a guest. Isn't there a difference?

Q. I don't know, ma'am. A. Don't ask me.

The Court: Do you recall what you did tell the building?

The Witness: I told the doorman, introduced my sister so that she would be able to come up into the apartment, and I said she would be staying at the apartment for awhile.

Q. And she occupied that apartment for approximately two weeks prior to the time that something happened? A. Yes.

- Q. During that period of time, ma'am, were you present in the aparement, that two-week period? A. No, I wasn't.
 - Q. You weren't there at all? (83) A. I was not.
- Q. During the period of time that your sister was in your apartment back in September of 1967, did you call her attention to the step, the door saddle and track between the patio and the dining room and advise her that it was approximately 6 to 8 inches high? A. No.

Q. Did you show her during that period of time how to unlock the door from the patio—from the dining room to the terrace? A. Yes.

Q. And you showed her where the handle was to open the door, ma'am? A. Yes.

Mr. O'Donnell: That's all, thank you.

Re-direct Examination by Mr. Krimsky:

Q. Mrs. Rounick, do you recall specifically whether you showed her how to unlock the door and the door handle on the frame of the door before or after this accident? Do you recall whether that happened, specifically.

Mr. Conway: Objected to. She said she showed it to her when she first came.

The Court: I will sustain the objection. I think (84) it is self-evident. After the girl had stepped through the door you didn't have to show her where it was.

- Q. Mrs. Rounick, looking at the door itself, one could see the lock and the door handle if you looked at it from inside, could one not? A. Yes.
- Q. Showing you Plaintiff's Exhibit 2, would you indicate with an arrow on Plaintiff's Exhibit 2 the lock? A. (Marking.)
- Q. This frame that we are talking about and this door, is that a shiny substance or a dull substance, the metal

frame? A. Showing you Plaintiff's Exhibit 3, would you put an arrow in red, if you will, on the door handle that we have been referring to? A. (Marking.)

Q. Can you see that door handle from the outside if you are looking directly at it? A. You are asking me?

Q. Yes. A. No.

Q. Looking at P-1, would you mark on there, on the dark side, where the handle appears on the frame there? A. (Marking.)

(85) Q. What I am holding up now, Mrs. Rounick, is the photograph marked P-1, and your arrow there, red arrow pointing to the left, is pointing to the door handle in question; is that correct? A. Yes.

Q. And on P-3, you have pointed to the same handle with

the door open; is that correct? A. Yes.

- Q. Mrs. Rounick, you testified on direct examination that the room was 9 by 12; is that correct, approximately? A. Yes.
- Q. And you said that the wall that contained the doors was 9 feet, and that the other wall was 12 feet. Would you tell us whether—how does the room lay out lengthwise? A. 12 feet would be the length.
 - Q. The length of what? A. Of the room, approximately.
- Q. There is a wall dividing the dining room from the kitchen, is there not? A. Yes.
- Q. Is that longer or shorter than the wall where the windows are? A. It is shorter.
- Q. So that that wall would be longer than the other (86) wall, than the wall of the kitchen? A. Yes.
- Q. So that actually, then would it be fair to say that the 12-feet long is the side where the doors were? A. Yes.
- Q. So that when you said that was 9 feet, you were in error at that time; is that correct? A. (No response.)
- Q. You have already said that the doors were 5 feet in width each? A. Yes.
 - Q. That would be 10 feet? A. Yes.

- Q. Beside each door there is a foot or so of wall space, is there not? A. Yes.
- Q. So that that wall was more than 9 feet long; is that correct? A. Yes.
 - Q. And that was the longer of the walls? A. Yes.

Q. In the dining room? A. Yes.

Q. Do you understand what I am saying? (87) A. Yes.

Q. And do you agree with that? A. Yes.

- Q. You were questioned about this chandelier that you had. Under the chandelier, was there anything under the chandelier or did the chandelier light up the floor directly? A. There was a table.
- Q. And that appears in one of the photographs, P-4; is that correct? A. Yes.
- Q. Was the telephone always kept in that room? A. Yes.
- Q. And was it kept on that table? A. No, it was not always kept on the table.
- Q. But it was always in the room? A. It was always in the room.
- Q. You have mentioned, if you recall, that the step up from the living room on to this wooden step that appears here in P-3, how high was that?

Mr. Conway: Your Honor, we have gone all over this, I thought, several times.

The Court: It still might be a little unclear, so I will permit it again.

A. It is about 6 inches.

- (88) The Court: Above the dining room floor; is that right?
 - Q. Above the dining room floor? A. Yes.
- Q. That is your best recollection; is that correct? A. Yes.
 - Q. Has it changed since the time of this accident?
 Mr. O'Donnell: Objection.

Mr. Conway: Objected to.

The Court: Sustained.

I assume when you say 6 inches you are speaking as of the time of the accident?

The Witness: Yes.

Q. Have you altered that step up in any way since the time of the accident?

Mr. Conway: That is objected to.

A. No.

The Court: Sustained.

Q. Did you ever actually measure that step up, yourself? A. No, I didn't.

Q. Was there ever any intention on your part or on Renee's part for Renee to be a permanent resident? A. No—

Mr. Conway: Objected to.

(89) The Court: Sustained.

Mr. Conway: It has been answered. I move to strike.

The Court: It is stricken. I will instruct the jury to disregard her testimony concerning her intention with respect to permanency.

Q. Did you consider her a guest or a tenant?

Mr. Conway: That is objected to.

Mr. O'Donnell: Objected to.

A. A guest.

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The Court: Sustained. I think that calls for a legal conclusion.

Mr. Krimsky: The word "resident" that you permitted counsel to talk about is a legal conclusion, too.

The Court: I don't think the jury so understood it and I didn't so understand it at the time, and I am sure the witness doesn't know the legal definition of the word "resident." It only means that she was living in the apartment, at least I so construed it.

Mr. Krimsky: She was staying there. The Court: Staying in the apartment.

Q. Was her stay to be for a definite period of time or an indefinite period of time?

Mr. Conway: Objected to. Immaterial.

(90) The Court: Sustained.
Mr. Krimsky: Nothing further, thank you.

Re-cross Examination by Mr. Conway:

Q. This center line there is not a cord, is it? A. No.

Q. That is the edge of the door? A. Yes.

Q. Did these curtains operate together or did they operate in tandem? In other words, could you open one half of them and leave the other half there? A. No.

Q. In other words, you pulled one curtain and the other curtain closed at the same time? A. Yes.

By Mr. O'Donnell:

Q. Did you make any changes in the patio door, you yourself, between the time that you made this complaint to Archie in 1967 and the time—

Mr. Krimsky: If your Honor please, this is going outside the scope of redirect examination.

Mr. O'Donnell: I don't think so. It is cross-examination.

The Court: I will permit it.

(91) Q. Did you yourself make any changes in the patio door between the time that you spoke to Archie in September of 1967 to the time that you left to go to the Hamptons in June of 1968? A. No.

Q. So that these doors were in the same condition when you left to go to the Hamptons in June of 1968 as they were when you showed them to your sister in November of 1967? A. Yes.

Mr. O'Donnell: That's all.

The Court: Any further questions?

Mr. Krimsky: I have no further questions.

The Court: Thank you, Mrs. Rounick.

(Witness excused.)

Mr. Krimsky: If your Honor please, at this time I would like to read into the record a certain portion of the lease which was attached to the answers to interrogatories given by defendant.

The Court: Are they just brief portions?

Mr. Krimsky: Yes, sir.

The Court: All right. Has this been marked as an exhibit yet?

Mr. Krimsky: No, it has not, sir. The Court: I think it should be.

(92) Mr. O'Donnell: Your Honor, may we have the date of that?

Mr. Krimsky: That is the lease that they attached—

Mr. O'Donnell: That isn't what I asked.

The Court: What is the date of the lease, Mr. Krimsky?

Mr. Krimsky: It says, in response to a question, sir—

Mr. O'Donnell: You are evading-

Mr. Krimsky: If you don't mind permitting me— The Court: Please. Address your remarks to the Court.

Mr. Krimsky: Thank you.

The date of the lease appears as June 23, 1970. However, your Honor, in response to an interroga-

Colloquy

tory, we requested that they furnish us with a copy, in answer to certain quesitons that he attached this copy of this lease and said this is the lease that was in effect as of the date of this incident. If there is a different one, then let them produce that different one.

The Court: Mr. O'Donnell, is there any dispute that this was the lease that was in effect at the time of the accident?

Mr. O'Donnell: No, sir, it is not the lease that (93) was in effect at the time of the accident. As far as I know, it was a specific lease for the period of time July of 1968. And if he has a wrong copy of the lease or a wrong lease, I don't know. It seems to be on a standard form, standard apartment lease. If there is a lease in effect—

Mr. Krimsky: It says "Jack Rounick," your Honor, "Apartment 20-S, between Jack Rounick and 215 East 68th Street, Inc."

The Court: The only trouble is the date. This is two years after the accident.

Mr. Krimsky: But this is the lease that they attached to the answers to the interrogatories and said that is the lease. They are bound by that.

Mr. O'Donnell: Are they my interrogatories? The Court: Your answers to interrogatories.

Mr. O'Donnell: Then they are not binding on me.

The Court: I have asked counsel to produce a lease and he said he doesn't have it.

Mr. O'Donnell: I said I would produce it when I am ready, it was subpoenaed.

The Court: Do you have it with you?

Mr. O'Donnell: Yes, sir.

The Court: Will you produce it when it is necessary?

Colloquy

Mr. O'Donnell: If it is germane to my case, yes.

(94) The Court: Unfortunately, the Court isn't going to permit you that privilege. This is relevant to the issues before us and I think you ought to produce it.

Mr. O'Donnell: If that is your direction, your Honor, then I will produce it.

The Court: It is obviously relevant. Perhaps plaintiff's counsel was a little bit, let's say, trusting in relying on the answers of the other defendants to interrogatories to the effect that this was the lease in effect at the time of the accident. If he hadn't been so trusting perhaps I would have asked you to produce it, but it would have obviously been producible if it had been requested.

Mr. Krimsky: Can we have that by tomorrow morning, your Honor?

The Court: Can you bring it in for tomorrow, Mr. O'Donnell?

Mr. O'Donnell: I will try, your Honor. I have my witnesses on tap for Wednesday, but I will try to have it brought in.

Mr. Krimsky: Thank you.

If your Honor please, ownership of the building has been admitted, and operation and control of certain portions of the building has been admitted by the defendant 215 East 68th Street. It has also been admitted that (95) Jack and Lois Rounick were the tenants who occupied Apartment 20-S at 215 East 68th Street at the time of the accident.

Mr. O'Donnell: I move that this all be stricken, your Honor, especially in front of a jury. There's also been operation and control of the apartment that's been denied by Defendant 215 East 68th Street.

Mr. Krimsky: I said the apartment building, your Honor.

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The Court: If you want to read any requests for admissions and answers to requests for admission, you may do that, Mr. Krimsky. But if there is any dispuic at all about the substance of what you are saying, it is much preferable for you to do that than to summarize it.

Mr. O'Donnell: Your Honor, may I request your Honor that the jury be directed to disregard this entire colloquy?

The Court: Yes, I will instruct the jury to disregard the statement made by Mr. Krimsky since there is no question about them. There apparently have been requests for admissions and answers. A request for admission is a request by one party to admit certain statements of fact and the other party is required to admit or deny those statements of fact. Those will be read into the record so that you can judge for yourselves what was admitted and what wasn't. So (96) you will disregard the statement made by Mr. Krimsky in which he purported to summarize those admissions.

Mr. Krimsky: Shall I make my offer at the side bar out of the presence of the jury, your Honor?

This is an answer to the complaint.

The Court: If you want to read from an answer to the complaint, you don't have to do that at the side bar, unless there is some question about it.

Mr. Krimsky: If your Honor please, Paragraph 2 Section F answering a first cause of action, in which the defendant 215 East 68th Street answering the amended complaint upon information and belief, in answering the first cause of action, Paragraph 2nd, says that 215 East 68th Street, Inc., was-

Mr. O'Donnell: Objection. I request now that the paragraph, if it is going to be read, that the paragraph of the complaint to which it refers be

read and also that the paragraph in total be read to the jury as it stands in the pleadings and not summarized or paraphrased by counsel.

The Court: I understood that he was reading

directly from the entries.

Mr. O'Donnell: No, he was not.

The Court: Please confine yourself to reading

and not summarizing.

(97) Mr. Krimsky: "Denies upon information and belief all the allegations contained in paragraph numbered 4th of the amended complaint, except admits that the defendant 215 East 68th Street, Inc., was the owner of the building located at tha address and had control of the parts used in common."

Mr. O'Donnell: Right.

Mr. Krimsky: I call Miss Renee Kalschuer.

Mr. Krimsky: If your Honor please, may I make a suggestion that these four members of the jury be permitted to sit up there in the back row?

The Court: I think it might be better because the way the jury box is set up, it is pretty hard for the people down at the back end to see over the other people in front of them.

(Pause.)

RENEE KALSCHUER, called as a witness by the Plaintiffs, was duly sworn and testified as follows:

Direct Examination by Mr. Krimsky:

- Q. Renee, how old are you? A. Twenty-four.
- Q. When were you born?

Mr. O'Donnell: Your Honor, may I ask that counsel please stand so he is not blocking the view of the witness?

(98) The Court: If you can move over just a little bit I think you will be out of the way of both counsel.

Q. You are presently twenty-four years of age. Can you give your date of birth? A. August 20, 1959.

Q. Can you keep your voice up so that all the jury can

hear you.

What are the names of your parents? A. Norbert and Isabel Kalschuer.

Q. Where do they presently reside? A. In Madison, Wisconsin.

Q. In 1968, in June of 1968, where did they reside? A. In Sauk City, Wisconsin.

Q. Are you related to the defendants Jack and Lois Rounick? A. Lois Rounick is my sister.

Q. Jack is now your ex-brother-in-law; is that correct?

A. That's right.

- Q. You heard your sister lived there at this apartment following her marriage in 1966, in July of 1966, her marriage to Jack, and then she went on to live at this Apartment 20-S at East 68th Street; is that correct? A. Yes.
 - Q. Do you agree with that? (99) A. Yes.

Q. Where were you at that time? A. In '66?

Q. In '66. A. I was in Wisconsin in high school.

- Q. When did you graduate high school? A. June of '67.
- Q. During '66 and '67, did you visit your sister at this apartment? A. Not while I was in high school.

Q. When did you graduate high school? A. June of '67.

- Q. Then after June of '67, when is the first time that you came to this apartment? A. Probably at Thanksgiving time in 1967.
- Q. Where were you residing at that time, in the early part of 1967? A. I was at school.
- Q. I mean the latter part of '67, I'm sorry. A. I was in school in Philadelphia.
 - Q. What school is that? A. Harcum Junior College.
 - Q. That is located right outside Philadelphia? A. Yes.

(100) Q. Harcum Junior College is what kind of college? A. It is a two-year school for retailing or liberal arts, whatever.

Q. What courses did you have there? A. I took a two-

year course in liberal arts.

Q. After November of 1967, after that Thanksgiving—incidentally, when you were there in November of 1967, that Thanksgiving, how long were you there for? A. Probably three or maybe four days.

Q. During that time were you ever out on the terrace?

A. No, not to my knowledge.

Q. Were you ever out on the terrace at night? A. No, I know I wasn't out on the terrace at night.

Q. When is the next time that you visited those premises? A. Sometime after Christmas. I know I was there for a weekend once again.

Q. A weekend? A. Right.

Q. After Christmas of '67, you are saying? A. Right.

Q. That Christmas-New Year holiday? A. Yes.

Q. So that would bring you into '68? A. Right. (101) Q. Do you know what part of '68 it would be? A. I know that it was winter.

Q. When you say winter, you mean the first part of '68, then, the January-February months? A. Right.

Q. During that time, do you remember whether or not you were out on the terrace at any time during the evening, at night? A. Before the accident?

Q. Before the accident. A. No, I know I wasn't out

there at night.

Q. You have heard a description of the windows and the drapes by your sister, Mrs. Rounick, that was made. Do you agree with that description? A. Yes.

Q. Of the glass doors in question? A. Yes.

Q. Do you recall how high the step up is from the dining room onto that ledge? A. Yes. It is only about, I would guess that five inches would be the maximum it could possibly be from the floor to the top of the ledge.

Q. Five inches would be the maximum? A. Right. (102) Q. And you started to say it could possibly be what? A. Less. More than likely.

Q. At the time in June, that summer of '68, when did you come to the apartment? A. About a week—well, about 10 days to two weeks before the accident.

Q. Where had you been prior to that? A. I had gone

home to visit my parents in Wisconsin.

Q. After school? A. Right.

Q. Do you know about when school was let out? A. I'm not sure, probably the end of May.

Q. Incidentally, how many brothers and sisters do you

have?

Mr. Conway: That is irrelevant. Mr. O'Donnell: Yes, objected to. The Court: Sustained.

Q. Where was Mrs. Rounick when you came to New York? A. In '68?

Q. In '68. A. She was in East Hampton.

- Q. Would you tell us what the condition of the windows and the drapes, et cetera, were in that particular room at that time?
- (103) Mr. O'Donnell: Objection. On that particular day? The question is ambiguous, your Honor. I ask that it be more specific as to time.

The Court: This is when she came there in June

of 1968?

Mr. Krimsky: Yes.

The Court: When she first arrived? Mr. O'Donnell: On the first day?

The Court: Yes.

Q. The first day that you were there, that you actually noticed the drapes and the doorways, in June of 1968. A. The drapes were closed and we didn't go into the dining room.

Q. Do you recall whether that was the first, second, third, fourth day, or whatever it is, after you arrived there? A. No, I don't recall.

Q. When you arrived there, how long was it your intention to remain at that apartment?

Mr. Conway: Objected to.

Mr. O'Donnell: I object, your Honor.

The Court: I think she can answer as to whether or not this was going to be a brief visit or an extended visit. She may answer.

(104) A. Only until I got on my feet financially, modeling, and I could find someone else to live with.

Q. In any event, what was your intention regarding—you had just completed your first year of school; is that correct? A. Right.

Q. What was your intention regarding completing your education or not completing your education?

Mr. O'Donnell: Objection.

The Court: I think she may answer. This goes to the matter of her chosen career.

A. My father and I had come to an agreement that if I had finished two years of school, I could model full-time if I still wanted to, that I should do it for the summers until then; that it is always what I had wanted to do.

Q. Had you been registered to return to Harcum? A. Yes.

Q. Who had been living at the apartment—your sister was away at East Hampton and who was living there? A. My brother-in-law.

Q. That is the defendant Jack Rounick; is that correct? A. Yes.

Q. Was there anyone else on the premises at that time? A. No.

(105) Q. I direct your attention to July 10, 1968 and ask you if you were involved in an accident at that time on that day. A. I was.

Q. Would you tell us approximately when that accident was? A. It happened at about—well, probably between 10,000 and 10,200 at night

tween 10:00 and 10:30 at night.

Q. How long had you been in the apartment that evening? A. That evening we were probably there for about a half hour.

Q. You say "we" were probably there. Who was there with you? A. Two of my friends, two young men.

Q. What are their names? A. Michael Kelly and Michael Wright.

Q. Do you know where they are today? A. No, I really don't have any idea. I tried to track them down, but I can't find them.

Q. At the time, where were they living? A. At the time they both lived in Manhattan.

- Q. Did you check on their addresses, the addresses that they were— A. Mike Kelly went to Colifornia and his parents moved out of their apartment. The last I heard from him was about (106) four years ago. And Mike Wright was going to school at Georgetown the last I had heard from him, but he had graduated by the time I could get in touch with Georgetown to find out where he was, and his mother is no longer at the address that she lived at, and she is remarried.
 - Q. She has a different name? A. Yes.
- Q. But in answer to interrogatories that you made, you gave their names and addresses? A. Right. I did have addresses then.
- Q. On the evening between 10:00 and 10:30 you were in the apartment with Mike Kelly and Michael Wright, and you had been there, you said, for how long? A. About a half hour.
- Q. What was your purpose in being there? A. We were there because we were going to meet my brother-

in-law. He had gone out for dinner and he was coming back. We were going to meet him. He was going to take us someplace, I'm not sure where it was.

Q. Would you tell us, would you go on in your own words? Where were you seated, incidentally? A. We were seated in the living room.

Q. How far is the living room from the dining room?

A. It is the next room over.

(107) Q. Does the living room have windows? A. Yes. Q. Do they face in the same direction or a different direction than the dining room doors? A. They face in a different direction.

Q. Do you know whether they face towards—which way do they face, if you know? A. Well, the building, I don't know, is a horseshoe, I guess, and they face towards the next section of the building.

Q. Towards the west, which would be Third Avenue? A. Yes.

Q. Would you tell us in your own words what happened, Renee? A. We were sitting in the living room and we heard sirens and noise coming from outside. There was always noise but it was more than usual, a lot more. And one of the fellows, I'm not sure which one, said, let's go see what's going on. I knew that there was a terrace, so I said, let's look from the terrace.

And we went into the dining room and the curtains were closed, so I opened the curtains and then found the lock in the middle, and unlocked the door. And I opened it and I went out. And then Mike Kelly and Mike Wright followed me. And I went to stand towards Third Avenue, so I was closest (108) to the—I was furthest on the left. And Mike Wright was standing next to me and Mike Kelly was standing next to him.

Q. Before you go on, Renee, when you opened the door, did the door make any noise? A. No.

Q. What was the condition of the glass? Did you see anything on the windows at all, the glass windows? A. No.

Q. Did they appear that night, except of course for different lighting conditions, but did they appear, the glass doors, substantially as these photographs show that they did? A. Yes.

Mr. Conway: What number is that exhibit, please?

Mr. Krimsky: I showed P-1.

Q. You slid the door open from which side to which side? A. Left to right.

Q. You said you walked out. Did you say you walked out first; I'm sorry. A. Yes.

Q. And the two gentlemen followed you? A. Right.

Q. How wide had you opened the door? A. I opened it all the way, because I turned around to watch them follow me, and they were side by side, so it had to (109) be all the way.

Q. And then you were standing on the terrace, you said? A. Right.

Q. You were the closest to Third Avenue and Mike Wright was next to you and Mike Kelly was next to him. How long had you been out there? A. I would say between five and ten minutes, not more than that, definitely.

Q. During that time did you have any conversation? A. Yes. I don't remember what was said, but we were definitely talking about what we were trying to figure out was going on.

Q. Was going on where? A. Up on Third Avenue. We couldn't really see. We heard a lot of noise and saw a lot of cars.

Q. Then what happened? A. Then Mike Wright said to me that the phone was ringing. And I was expecting Jack to call, so I turned around and—

Q. Which way did you turn? A. I turned to my left, because that was the closest way to go.

Q. Which would be away from the other fellows? A. Right. And I looked ahead of me, and I saw that (110) the door was open, or it looked to me as though it was open, very definitely. And I walked in to get to the phone, and when I—I stepped up, because you could step—well, it doesn't matter, but you could step all the way over the little ledge, and that's what I think I had in my mind, and the glass broke all around me, on the floor, and I looked ahead of me and Mike Kelly was coming in from the living room and he said, "Oh, my God, are you all right," I'm sorry. And he said that he had closed the door, and then I looked at my leg and I could see a big white hole. And then I knew that there was something the matter, and it started to bleed, and I started to cry.

That's what happened.

Q. Renee, when you were coming into that space that you thought was an open door, you said you brought your right foot up, put it up a step, or whatever. Did anything come in contact with anything at that point? A. My knee hit the glass first and I put my hands up like this.

Q. To protect your face? A. Yes.

Mr. O'Donnell: Objection.
The Court: On what ground?

Mr. O'Donnell: Characterization. Calling for a conclusion.

(111) The Court: I thought the question was what she did.

Mr. O'Donnell: No. Counsel said to protect her face.

Mr. Krimsky: She indicated her hands up to her face and it was obvious it was to her face.

The Court: I will strike the question.

Mr. Krimsky: Strike the question, on that part of the answer, sir?

The Court: That's what I thought sho said the first time, she had put her hand up to protect her face, and you objected on the ground that counsel said to protect her face.

Q. Why did you put your hands up? A. To protect my face. It was an instant reaction.

Q. At the time that you were coming in from the terrace through the door, how would you characterize your mode of walking? In other words, were you at a slow pace, a moderate pace, or were you hurrying, or what? A. Fast. I heard the phone ringing, I was going fast—no, I didn't hear the phone ringing, as a matter of fact.

Q. You did not hear the phone ringing? A. No. I heard him say it, so I assumed that the phone was ringing.

Q. And you turned to your left and you started walking (112) through. You say you did not hear the phone ring or you don't recollect whether you heard it ringing? A. Well, I don't remember. It might have been ringing. I just sort of blacked out everything that happened, anyway.

Q. How many steps would you say that you took crossing the terrace? A. I would say four, maximum.

Q. Renee, as you were walking towards the doorway, or what you thought was the doorway, what appearance did that doorway give to you? A. It looked as though there was nothing there. I am very conscious of anything in front of me. I'm not—well, that's my character.

Q. It was brought out through the testimony of your sister that you are nearsighted. Were you wearing your glasses that night? A. Yes, I was wearing my glasses.

Q. Was there any reflection whatsoever on the glass doors that evening, from the outside? A. No, it looked completely clear.

Mr. Krimsky: Excuse me, your Honor. I am going into another phase now.

The Court: All right. We can take our afternoon break here. Ten minutes.

(149) RENEE KALSCHUER, previously sworn, resumed the stand and testified further as follows:

Mr. Krimsky: May I ask one question, your Honor?

The Court: You may.

Direct Examination (Continued) by Mr. Krimsky:

Q. When you saw the door break or shatter, whatever it was, would you describe for his Honor and the members of the jury what the pieces of glass looked like?

Mr. O'Donnell: Objection. It has already been asked and answered.

The Court: I believe that is repetitious, Counsel.

Mr. Krimsky: Thank you, your Honor.

The Court: Mr. Conway.

(150) Cross Examination by Mr. Conway:

Q. Miss Kalschuer, on the night of the accident, where had you been earlier in the day or evening? A. We had been out having dinner.

Q. Where did you have dinner? A. Well, it was a hamburger place. I'm not sure where.

Q. And you got to the apartment approximately what time? A. About ten or a quarter of ten.

Q. And your accident happened at about what time? A. Sometime between 10:00 and 10:30.

Q. How long did you stay in the apartment after your accident before you were taken off to Lenox Hill? A. I don't have any idea. It might have been a half hour. I just wasn't conscious of any amount of time.

Q. There came a time, did there not, that Mr. Rounick

did appear at the apartment? A. Yes.

Q. Neither he nor Mrs. Rounick were there at the time? A. Right.

Q. You were there with these two young men whose

names you mentioned yesterday? A. Right.

- Q. Having the date with the two young men, I gather (151) you didn't wear your glasses, did you? A. Yes, I did.
 - Q. Did you? A. Yes.

Q. Do you need your glasses to see? A. Yes.

- Q. What are you, nearsighted, farsighted, or what? A. Nearsighted.
 - Q. You did have your glasses on at the time? A. Yes.
- Q. As you were in the apartment you said you heard some noise or sirens or something outside? A. Yes.
- Q. And that is when you and the two young men went out on the terrace? A. That's right.
- Q. You knew the way the terrace door opened, did you not? A. Well, by looking at them I could tell.

Q. You had been out on that terrace a number of times before? A. No, I hadn't been out on a number of times.

- Q. Was this your first time? A. I'm sure it was my first at night. I have gone (152) out there after the accident. It is five years. I'm not sure if I had been out there before.
- Q. No, I'm talking about before the accident. Were you never out there before? A. Not that I can remember.
- Q. Didn't you always have a habit of going out and leaving the door open? A. No.
- Q. Miss Kalschuer, I'm sure you have read over your examination before trial, have you not? A. No.

Q. Since the time you gave it and the time it was submitted to you for signature and swearing to it, you have never seen it again since? A. No, I haven't. Mr. Krimsky had it.

Q. I know he has it. But I mean in the last couple of days, for instance, the last week, he didn't go over it with you? A. He went over parts of it but he didn't

show it to me.

Q. He didn't give it to you and say, here, this is what you said back in 1973, read it over because you are going to get some questions about it? A. No.

Q. I show you this paper and ask you if that is your

(153) signature. A. Yes, it is.

Q. And you read and swore to this, to the truth of it, on April 10 of 1973; is that correct? A. That's right.

Q. Do you remember being asked this question and swearing to this answer, page 43.

Mr. Conway: Does your Honor have a copy? The Court: No, I don't.

Mr. O'Donnell: I have an additional copy, sir, if you want it.

The Court: All right, please.

(Pause.)

Mr. Conway: Page 43, your Honor, line 15:

Q. "Q. Was it your habit when you left the apartment to go out on the terrace to leave the door open during the summer? A. Yes."

Did you say that? A. I must have said it if it is written there.

Q. Was it true that usually when you went out there on the terrace you left the door open? A. Well, can I qualify that?

Q. Can you answer me that question? Did you usually (154) leave the door open when you went out on the terrace? A. That question was asked in 1973. They didn't ask me if that's what I did before the accident.

- Q. Oh, well, let's see. On the same page, at line 10:
- "Q. What kind of a night was it? Was it a hot night? A. Yes, hot.
- "Q. The apartment, I take it, was air conditioned; is that right? A. Yes."

You are talking about that same night; right? A. Yes. Q. "Q. Was it your habit when you left the apartment to go out on the terrace to leave the door open during the summer? A. Yes."

Those are the three questions in sequence and you are talking about the night of the accident, were you not? A. I wasn't talking about it in the answer to the last question.

- Q. You are saying that this was the first time you had gone out on the terrace; right? A. I'm not saying that it was the first time. I am saying that it may have been the first. I'm not certain.
- (155) Q. You had been visiting your sister at various times on various weekends in addition to the Thanksgiving holiday, prior to the time of your accident, had you not? A. I had been there probably once, maybe twice, other than Thanksgiving.
- Q. On page 6 were you asked these questions and did you make these answers?
- "Q. Have you ever stayed there at that apartment prior to July 10 of 1968? A. Yes, I stayed there.
- "Q. On a number of occasions? A. I would come down sometimes for weekends.
- "Q. That was during that eight or nine year period? A. Only when I started to go to school. That was in 1967, so only from then on.
- "Q. You came down from Boston for weekends and visited your sister? A. Yes."
- A. I was in Boston starting in 1969. The fellow who asked me those questions was giving me dates and places in complete out of order. It was a little bit mixed up.

- Q. Let me ask you this one, if this is out of order:
- "Q. On a number of occasions?" Speaking about (156) spending weekends. A. I would come down there sometimes for weekends.
- "Q. This was during that eight or nine year period? A. Only when I started to go to school. That was in 1967, on only from then on."

Did you say that? A. Did I say that?

- Q. Yes. A. Yes.
- Q. In 1967 you were down in Philadelphia at the Harcum Junior College? A. Right.
- Q. And you came down on weekends on occasions? A. I came up for Thanksgiving and probably one other weekend: twice.
- Q. On other occasions you had been in the dining room, then, you did see the doors, did you not? A. I had seen the doors, yes.
 - Q. And you knew the doors were there? A. Yes.
- Q. On the evening of the accident when you went out you were the one who opened the door? A. That's right.
- Q. Did you open it all the way or did you open it just (157) partway, enough to get out to the terrace? A. No, I opened it all the way.
- Q. Are you sure of that? A. I am sure because I saw Mike Wright and Mike Kelly walk out side by side, so I must have opened it all the way.
- Q. Back in 1973 were you asked these questions and did you give these answers, page 15:
- "When you slid it open, how far did you slide it? A. I don't remember.
- "Q. There was enough room for you to enter upon the terrace: right? A. Right."

Was that your remembrance back in 1973? A. That's right.

Q. Your memory has been refreshed since then? A. I can tell you what happened.

Q. I say, has your memory been refreshed since that time up to the time of the trial? A. After that deposition was taken I knew that there were some things about it that couldn't be right. So I went back to my sister's apartment, I went into the dining room and I looked at the glass door to try and remember. It wasn't something that I liked thinking about.

Q. Before you signed this deposition you had ample (158) opportunity to go over and read it and to make any corrections, did you not? A. I was in Boston.

Q. I don't know where you were, but you did read it over and sign and swear to it in April of 1973, did you not? A. Yes.

Q. You did not make any changes at that time? A. No, I didn't.

Q. So the changes, now, that you are remembering, were sometime after you signed and swore to these answers? A. That was sent to me in the mail. I wasn't told what to do with it except to sign it.

Q. You were told to read it over and make sure before you signed it, were you not? A. That was what I had said.

Q. Was it the truth when you said it? A. No, it wasn't. Some of it couldn't have been.

Q. But you did swear to the truth of it in April of 1973, did you not? A. Yes, and—well—

Q. You said it was sent to you in the mail and you were told to read it over and sign it? A. Yes.

Q. Then what did you do with it? (159) A. I sent it back.

Q. Did you swear to it before a notary public? A. Yes.

Q. That was up in Boston? A. Right.

Q. When you went out there that night, two of these men were with you, were they not? A. Yes.

Q. You were all interested in the sirens and everything that was going on. You stayed there for about how long? A. Five, ten minutes.

Q. During that five or ten minutes, I gather you were talking together and watching, looking down to see what the noise was about? A. Right.

Q. Did you notice one of them going away, one of the men? A. No, I didn't.

Q. Did one of the men leave? A. He must have, because he was inside when I got in there.

Q. And you weren't paying any attention to whether he was there or not? A. Right. I was paying attention to what was going on (160) outside.

Q. How long were you out there alone with the other boy, do you know? A. I don't have any idea. Well, I mean I was talking with both of them for awhile, so I would say half the time at least he must have been out there.

Q. But he suddenly disappeared without you noticing him? A. Right.

Q. This terrace is only about five or six feet wide, isn't it? A. Right.

Q. In other words, you weren't paying any attention to what he was doing? A. Yes, you may say that.

Q. You said that the Wright boy that was with you told you the phone was ringing? A. Yes.

Q. You didn't hear it? A. I don't remember if I heard it or not. I remember him saying that.

Q. When he said it and you didn't hear it, did that give you any idea that the door had been closed?

Mr. Krimsky: Objection, your Honor.

(161) The Court: I think it is proper cross examination.

Mr. Krimsky: If your Honor please, he is saying "when you didn't hear it." She never said that she didn't hear it.

The Court: All right. I think that part of it doesn't fairly reflect the record.

Q. Yesterday you said that you did not hear it but that Mr. Wright told you, did you not? A. I don't think I said that. I don't recall hearing it.

Q. But at least he heard it, or at least he told you he

heard it? A. Yes.

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Q. And this phone, incidentally, was where? A. On the dining room table.

Q. In other words, five or six or seven feet away from

where you were standing? A. Right.

Q. At that point you turned and you practically ran into the dining room, didn't you? A. No, I went as though there were a phone ringing and I was expecting a call.

Q. Did you go in a hurried fashion? A. Yes.

(162) Q. And you went in such a hurried fashion that when you did hit this door you went through it and you were still standing, weren't you? A. Yes. I don't think it was my speed but the fact that my knee went through the door and a smaller point will be through faster than a whole body.

Q. In order to go through there, you had to take a step

up, didn't you? A. Yes.

Q. Did you see the thing that you were stepping up on? A. Yes.

Q. So that as you came to the door you saw the seven or eight inch step that you had to get up on? A. Yes.

Q. On the outside of these doors, is there some sort of a marble slab, white marble? A. I'm not sure. If it is in the picture and there is, I—

Q. But you don't remember it? A. No.

Q. Did you see a white marble slab that evening? A. I don't remember. I know that I looked down.

Q. You say you thought you looked down? A. Yes.

(163) Q. You know that if you looked down there is a track that is raised about an inch high across the top, is there not? A. That's right.

Q. Did you see the track that night? A. Yes.

Q. The door wasn't over the track? A. The band of the doors is as high as the track.

Q. I asked you, did you see the track? A. I thought that I did. I saw the track, yes.

Q. The door was closed over the track? A. It looked to me as if it was open over the track.

Q. You weren't paying too much attention to that, then, were you, as you were hurrying in? A. Yes, I was.

Q. And you don't know whether or not you saw the track there? A. No; I did see the track.

Q. When the door closes it runs along and over the track, does it not? A. That's right.

Q. Was the door partly open? A. At which point?

Q. At any point when you were going back in. (164)
A. When I was going back in it was closed.

Q. Was any part of it open? A. No.

Q. But you could still, you say you could still see the track? A. Yes.

Q. Do both of these doors open, or just one? A. Just one.

Q. So that there is only one track that the door runs on, there isn't another track for the other door? A. (No response.)

Q. In other words, there isn't a double track there for one door to pass one way and the other door to pass the other? A. I wouldn't think so.

Q. Did you go through the permanent glass door or the one that was movable? A. The one that was moveable.

Q. And your whole thought at that point was to hurry in and get the phone, wasn't it? A. No, I was thinking about what I was doing.

Q. Your whole thought at that time was to hurry in to get to the phone? A. No.

(165) Q. What other thought did you have? A. I was thinking about where I was going to.

Q. But you didn't see the glass? A. No.

Q. You didn't see the marble step that you had to step up on?

Mr. Krimsky: If your Honor please, there is no proof that there is a marble step there, as a matter of fact.

The Court: Sustained.

Q. Was there a marble step on the-

Mr. Krimsky: She has already answered that, your Honor.

The Court: Yes, that is repetitious. She said she doesn't know.

Q. Was there a shiny strip of board on the inside? A. There was a strip of board, but it wasn't shiny.

Q. On this picture which is Exhibit 3, do you see the strip of marble on the outside there, on the terrace side?

Mr. Krimsky: If your Honor please, I object to the use of the word "marble." There is no proof that it was a strip of marble. It may be a strip of some sort of material, but the use of the word "marble"—

The Court: The question will be amended to indicate there was something that looks like marble.

(166) A. I knew there was a strip of something there, but I don't know what it's made of.

Q. You knew there was a strip of white there, didn't you? A. I think it is gray.

Mr. Krimsky: Let the record indicate that Mr. Conway is showing to the jury Plaintiff's Exhibit 3.

Q. You were able to see it enough, then, to determine that it was gray rather than white; is that right? A. No, that is from looking at it after.

Q. Were you conscious of it that night? A. I was

conscious of what I was doing.

Q. And that was going through a door? A. That was

walking trough an open space.

- Q. When this accident happened, the only three that were there were you and your two friends; is that correct? A. That's right.
- Q. And you say it was one of your friends who closed the door? A. Yes.
- Q. When your knee hit the door you were going just so fast that you couldn't stop; is that right?

Mr. Krimsky: She didn't say that, your Honor.

A. No.

- (167) The Court: I think it is fair cross examination.
- Q. When your knee hit the door, were you going so fast that you couldn't stop? A. No. When you believe that there is nothing in front of you—I just kept going.

Q. When your knee hit the glass were you going so fast you couldn't stop? A. I'm not sure. I didn't stop.

- Q. You went right through and you were still on your feet, were you not? A. If I were going so fast, I think I would have fallen.
- Q. You were on your feet when you got in through the --into the dining room, were you not? A. Yes.
- Q. At any time prior to June 10, did you ever bump into that door? A. I don't remember ever bumping into it.
- Q. You what? A. I don't remember ever bumping into it.
- Q. Are you saying by that that you might have but just don't remember now? A. I might have brushed against it going around the dining room table.

Q. Page 38, do you remember being asked this question (168) and making this answer, line 12:

"Q. Prior to July 10 or 1968 while you were visiting the apartment of your sister where the accident happened, had you ever bumped into that door during the daytime or during the evening, or either from the dining room side or from the patio side? A. I'm not sure. I may have. I don't remember doing it."

A. And that's what I just said. I mean, I agree. I said that.

Q. Does that mean that you had been out on the patio at various times prior to this? A. No.

(186) Q. At the time that you were on the terrace on July 10, 1968, the date of your accident, you told us that Mr. Wright heard a phone ringing; is that correct? A. That's right.

Q. And I think you told us that you turned to your

left? A. That's right.

Q. At the time that you turned to your left, were you standing directly in front of the patio door that you eventually came in contact with, or were you at an angle from it? A. I'm not sure. I know that I was on the left-hand side of the patio.

Q. And you testified in your direct testimony that you took four steps from the place you were standing to the place where the door was located? (187) A. Approxi-

mately.

Q. And you told us, ma'am, that you were moving very quickly at the time you came in contact with the door; is that right? A. I think so, yes.

Q. And you told us that you were wearing your glasses

at the time? A. That's right.

Q. At the time you came in contact with the door, did your glasses break? A. No. I had my hands up.

Renee Kalschuer, a Plaintiff, Cross

Q. Did your glasses fall off? A. No.

Q. When you went through the patio door to the other side, you still had your glasses on? A. Yes.

Q. Miss Kalschuer, do you recall being asked this ques-

tion, page 17, line 10:

"Q. In other words, where you had been standing, it was opposite the opening of the door where you had exited from; is that right?"

And was your answer "Yes"? A. I don't know. I don't remember that. But if it is there, then that's what happened.

(188) Q. You did sign and have this deposition notarized? A. Yes, but I don't remember every question in that booklet.

Q. So are you telling us now, ma'am, that you don't know where you were standing on the terrace? A. That is probably where I was.

Q. Were you standing opposite the opening of the door that you had exited from? A. Yes.

Q. Question 14:

"Q. You say you hurried, is the answer yes? A. Yes."

A. Yes.

Q. And that was correct, was it not? A. Yes.

Q. That you hurried? A. Yes.

Q. And were you asked this question, line 16:

"Q. Did you take one step, a half a step, or more than one step, if you can tell us? A. I would say about five or six."

Did you make that answer in response to that question? A. I must have, if it is there.

(189) Q. And would that be correct, ma'am, that you took five or six steps in hurry as you approached the terrace door? A. No, because at the time that deposition was taken, I thought the terrace was even bigger than it was.

Renee Kalschuer, a Plaintiff, Re-direct

Q. So are you saying that your memory is better now than it was back in 1973 when you signed and notarized this deposition? A. I have looked at the terrace and I can tell how big it is. I couldn't have taken five or six steps from where I was standing.

Q. But you were hurrying? A. Yes.

(191) Re-direct Examination by Mr. Krimsky:

Q. Mr. Conway talked to you, asked you questions about page 43 and about whether you had been on the terrace or not before. Page 16, did you also say the following, in answer to a question "Had you been out on this terrace before this accident?" And you answered "I don't think so. I may have been, but I don't remember being."

Do you remember giving that answer? A. Yes.

Q. Mr. Conway asked you about a track. I am showing (192) you Plaintiff's Exhibit 3 and asked you about a track, and asked you if you could see that on the night that you were coming from the terrace.

Are you all right? A. No.

Q. Would you like a drink of water? A. Yes.

(Pause.)

(193) (In open court; jury not present.)

Mr. O'Donnell: Your Honor, pursuant to your directions yesterday, you asked me to have a copy of the lease produced. A messenger brought down a copy of a lease to me dated January 28, 1965 and running for a period of three years from October 1, 1965 to the 30th of September, 1968.

(194) The Court: Thank you.

Mr. O'Donnell: I think it has been agreed by Mr. Krimsky that this is a copy of the lease that was in effect.

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Mr. Krimsky: It is not signed or anything like that, but there are certain clauses in there that as far as my purpose is concerned I am satisfied if he will permit—I have just checked it against that other lease and the clauses are correct, are in accord with that lease. For my purposes it is satisfactory. I'm not agreeing that he may put this entire lease in evidence or anything like that unless it is further identified.

The Court: You can't use it and then deny him the use of it.

Mr. O'Donnell: If you want to mark it in evidence-

Mr. Krimsky: If Mr. O'Donnell says that this is indeed a copy of the signed lease at that time, I will accept his word and that will be that.

Mr. O'Donnell: We have been requested, your Honor, pursuant to your direction, that a copy of the lease that was in effect be produced for us today. A messenger from the client brought this one down. It is a carbon copy not signed by either party but they aver this is a copy of the lease in effect.

The Court: We will accept it, subject to correction.

(195) Mr. Conway: I'm sure it must have been. It is a typical landlord lease.

The Court: We have already accepted it, so no further comment is necessary. Let's bring the jury in.

(300) JOHN J. FLYNN, called as a witness by and on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct Examination by Mr. Krimsky:

Q. Mr. Flynn, where do you reside, sir? A. At Peter Lines, Pound Ridge, New York.

Q. What is your present business, sir? A. I am a professional engineer in private practice.

(301) Q. Where do you practice, sir? A. In Queens County, 39-14 104th Street, Corona.

Q. You are a graduate of what institution? A. Villanova University, class of 1968.

Q. With what degree, sir? A. Bachelor of Civil Engineering.

Q. Are you licensed as a professional engineer? A. Yes, in three states. New York, Connecticut and New Jersey.

Q. When did you become licensed in New York? A. In 1963.

Q. Are you also registered as an analyst for the Department of Defense Fallout Shelter Program? A. Yes.

Q. In order to become a civil engineer, would you tell His Honor and the members of the jury just exactly what is a civil engineer. A. A civil engineer could be many things. Basically, the term "civil engineer" is the designation applied to a particular field of engineering. It has to do with the construction of civil projets, but it includes the construction of private projects as well. Civil projects would include the construction of bridges, tunnels, highways, dams, harbor facilities. It is generally the construction of structures (302) without getting into or specializing in the structural connections, which a structural engineer would specialize in.

Q. You say it also encompasses private engineering. What do you mean by that? A. It is a very broad term.

Q. Does it have anything to do with construction of buildings? A. Yes. Building-construction engineers would be a subdivision of civil engineering or structural engineering. In the State of New York, a graduate engineer with a degree in any field of engineering, providing he can pass the professional engineer's examination, may practice engineering. There is no restrictions placed upon him. I could practice mechanical engineering, even though I am a civil, providing I am licensed to practice engineering and I have some experience in mechanical engineering.

Q. And providing you pass an examination. A. Providing I pass a general engineering examination, which includes mechanical, civil, structural; a general, broad

spectrum in all phases of engineering.

Q. Have you passed that examination in all three states? A. I passed it in New York. I was not required to—in New York. I was not required to take it in Connecticut or New Jersey. There is a reciprocal agreement between the three (303) states.

Q. Are you a member of any professional society, sir? A. Yes, I am. The New York chapter of the New York State Professional Engineering Society and the

state chapter.

Q. Any others? A. I am an associate member of the American Appraisal Association. I expect to be named

a member in the next few days.

Q. How do you become an associate member and a member? A. An associate member is the first-admission stage in the American Appraisal Association. You must take an examination and provide necessary appraisals to be certified as a full member.

Q. Are you also a member of the American Arbitration

Association? A. Yes, I am.

Q. Would you trace your specialty or your career since your graduation in 1968. A. Yes. Upon graduation from Villanova, I entered a program with the Corps of En-

gineers, which was nominally a training program, but what it turned out to be was more than that. It involved experience training in several phases of civil engineering; that is, the construction of airports, harbor, beach erosion studies, construction of facilities (304) at Griffiths Air Force Base, Fort Monmouth, New Jersey; McGuire Air Force Base, New Jersey. I started with them after graduation and left them two years later as assistant to the resident engineer at Fort Monmouth, charged with the supervision of the construction of Nike systems missile sites in the New York State area. At that time, missile threat was very real and there were 15 sites under construction which I was a supervisory authority on. I was not the major supervisor, but I was an assistant.

I left the Corps of Engineers and went to work for Shell Chemical Company in Union, New Jersey at their product development laboratory there, and I was concerned—I worked with them for a year concerning the development of construction applications, that is, chemical product fluids in the construction business—

The Court: Excuse me. Mr. Krimsky, do we need all of this experience here? Can you just summarize it and say that he's been involved in various construction projects?

Q. In your projects, have you been involved in any building construction? A. Yes, I have. If you will, I will just—I have been a building code field representative for the State of New York, training building administrators in the use of the (305) state construction code. I have been a supervisor, assistant supervisor for George E. Fuller Company, which I supervised the construction of three new buildings at the St. John's University campus. The Alexanders department store on Lexington Avenue and 59th Street; the CBS Building, 140 Broadway. I left the Fuller Company and went to work

for the Robert W. Hunt Company, which are testing and inspection specialists concerned with the construction, the material employed in the construction of various buildings and structures in the New York area.

Q. These include windows and doors? A. Everything. As it happened, the position called for supervisory authority over the inspection of products which included everything from hairpins to locomotives for shipment overseas.

Q. Including glass doors? A. Yes, to a minor degree. There was not that much glass, but some.

Q. Glass doors and glass windows? A. Glass doors, mullion, the designed wind-load stresses. etc., have to be inspected with testing companies before installation.

I left them and went into private practice in 1967 and have been in private practice ever since, as a specialist, (306) an accident reconstruction specialist.

Q. In the course of your practice, do you deal with glass doors and glass windows, et cetera? A. When called upon, yes.

Q. Have you previously examined, in your profession, glass doors and windows, et cetera? A. Yes, many times.

Q. Sir, are you an instructor anywhere? A. I was. I was an instructor at the Institute of Design and Construction in Brooklyn, which is—it has just recently been granted approval for an associate degree in building construction technology.

Q. What did you teach there? A. Building construction.

Q. Did you, at my request, go to the premises of 215 East 68th Street, to Apartment 20-S? A. Yes.

Q. Did you examine and make measurements of the glass doors located between the dinning room and the terrace? A. Yes.

Mr. O'Donnell: Your Honor, may we have a date of when this was done?

The Court: Yes.

Q. When was that done. (307) A. I don't have a date now. It was sometime early last week.

Mr. Conway: Last week? The Witness: Last week.

Q. Before we get to that, what is plate glass? A. Plate glass is a descriptive term to describe a certain type of glass used for windows, doors.

Q. What would be the difference, for example, between plate glass and tempered glass? A. Tempered glass is another description of glass used in the same area, but tempered means that it has been treated, heat treated to cause the glass to break differently. It is called "safety glass," if you want, pre-stressed glass. Tempered glass when struck will disintegrate into particles, glandular particles, whereas plate glass when struck will crack in shards.

Q. In shards? A. Yes. Tempered glass is used in place of plate glass where there is high incidence of breakage where they want to cut down the amount of dangerous glass particles flying around.

Q. Sir, you said that you made measurements of these

glass doors or glass door? A. Yes, I did.

Q. You made the examination. What were the results of (308) your examination, sir?

Mr. O'Donnell: Objection.

Mr. Conway: I think I am going to object to this. It is not specific. It is too broad.

The Court: Yes, it is awfully broad.

Mr. Conway: Also, the condition is not as it was at the time of the accident.

The Court: Let's find out what kind of conditions we are talking about. If he is talking about dimensions and things like that, then I think we can assume they haven't changed, unless the defendants show that the dimensions have changed. Let's

find out specifically what you are going to ask him about.

Mr. Krimsky: Very well, sir.

- Q. What did you measure when you were there? A. I measured the door, the opening, masonry opening, the dimensions, the height, size, widths, thickness, the configuration of the mullions, the under mullions, the top mullion, the bottom mullion, the shape of the door saddling, the protruding lip inside and outside and the height above the terrace.
- Q. Mr. Flynn, I don't know about the jurors or His Honor, but I am a little unfamiliar. You are using terms. Would it aid you if you could demonstrate what you are talking (309) about on this photograph, or any one of these photographs that are here? A. I could do that, if you wish.
 - Q. Do you want to use this, sir?

(Witness steps down.)

The Witness: Basically, I measured the masonry opening, which is the opening from masonry to masonry. The door opening—

Q. Before you go on with that— A. I measured the entire door. I measured the opening width and height.

Q. As you tell us what you measured, why don't you demonstrate. A. I measured the expanse of opening, that is, the width. I measured this to be from the inside mullion to the outside mullion, the entire opening to the far side with the handle, and the opening out to out, which is 9 feet 1 inch. In other words, this sliding portion of the glass is 5 foot 1 inch in width.

Q. That includes the two frames? A. That includes the handle, yes. This opening from the handle to the inside is 4 foot 11, so the combined widths of the door

is 10 feet.

Q. The reason why it is one inch longer here is the (310) handle is on this side?

Mr. Conway: May the record show that the witness on that exhibit is pointing to a red arrow where the handle is.

The Witness: That is the lock or door latch. The handle is on this side.

The Court: Did you say the clear opening was 4 feet 11?

The Witness: When I say "clear opening," I mean from the inside edge of the sliding portion to the other mullion.

The Court: In other words, the width of the exposed glass?

The Witness: No. The width out to out of the exposed frame. The side frames are 2-1/4 inches in depth, so that if you subtract 2 inches from those dimensions you will get the clear width of glass. You would have to subtract 6 inches because it would be 2, 2, and 2. The frame doubles up on itself, producing an obstruction of only 2 inches in the center.

Q. The total opening is what? A. The masonry opening is 10 foot. That is a 10-foot door.

Q. How much did you subtract from 10 feet in order to get the glass? Let's say— (311) A. Approximately, because each of the mullions—the bottom mullion, the top mullion and this side mullion are 2-1/4 inches in depth when closed. So you subtract 4 inches here and this is about an inch and a half in depth, so you would subtract an additional inch and a half or 5-1/2 inches from 10 feet and you'd get 9 foot 6-1/2 inches clear glass width.

Q. Could you tell us what the width of the sliding door is, just the glass part? A. The glass part would be approximately 3-1/2 inches less than 5 foot 1, which would make it 4 foot 9-1/2 inches.

The Court: What is 4 foot 9-1/2?

The Witness: The clear width of the glass on this side, approximately.

The Court: It has to be less than that, doesn't it, be-

cause the outside dimensions are 4 feet 11-

The Witness: No, this side is 5 foot 1, and this side is 4 foot 11. The sliding portion is 2 inches wider than the fixed position.

The Court: But even so, you have a 2-1/2 inch mullion on this—

The Witness: On this side the door handle is not 2-1/2 inches. It's about an inch and a quarter.

The Court: So you are talking 3-5/4 from 5 foot 1.

- (312) Q. In any event, it is in excess of 4-1/2 feet wide? A. Yes.
- Q. How about the height? A. The height, top to bottom from the door saddle to the top of the door is 6 foot 9 inches.
- Q. When you say the door saddle, what do you mean? A. The door saddle is the treadle or the door tread which crosses across the door opening and covers the expansion joint between the outside construction and the inside construction. It is an aluminum tread.
- Q. Perhaps you could, using PX-3, just tell us what you mean by that. A. This is the door tread (indicating). It contains one track. The dark line is the track which the door slides in. The lighter lines running this way are an abrasive surface on the aluminum to prevent it from being a slippery burnished metal surface.

Q. You measured the door from where on that photograph? A. From the door saddle to the top of the door opening. You can't see it in this picture, but you can

in the other.

Q. Use this one. A. Here. Slightly above the dark line, because the (313) dark line is the door frame.

Q. What does that measure? A. 6 foot 9 inches.

Q. What does the glass portion measure? A. It would be approximately 5 inches less than that, or 4-1/2 inches less than that, so we would say that would be 6 foot 4-1/2 inches glass height.

Q. Tell us what else you measured about the door.

A. I measured the width of this step, which is a wood

step.

Q. Excuse me, before you get to that, what is the measurement of this right here? A. That is 2-1/4 inches, the bottom frame of the door.

Q. What about the top frame? A. It is the same.

The same structural member.

Q. You were talking about the step. A. The inside surface of the wall is covered by a wood, decorative wood sill, a hardwood sill, mahogany, I believe. It is 8-3/8 inches wide and runs the full length of the door opening.

Mr. Conway: That 8 is from the track?

The Witness: From the inside edge of the track to the outside edge of the top of the step.

Q. Go on, sir. (314) A. I measured the outside elevation of this step—you don't have a picture of that, but outside there is a step down to the surface of the balcony, and that dimension is 7 inches from the top of the—there is a stone ledge, a stone lift corresponding in elevation to this wooden one inside, and that is 2 inches in thickness and there is a 5-foot space below it to the surface of the porch.

5 inches. Did I say 5 feet? 5 inches.

Q. So that the step up is— A. 7 inches step upward from the balcony floor surface to the sill of the door. There's about 3/4 of an inch height in the sill, so it would be about 5-3/4 inches from the sill to the sliding door.

Q. What about that step up? A. I don't have a dimension on that, but it is approximately even. You would

step up the same distance going and coming.

Q. It is a concrete surface; is that right? A. Yes.

Q. Is the floor of the dining room concrete? A. The floor under the decorative wood flooring is concrete, yes. The difference in height might be 3/4 of an inch, might be the thickness of the wood floor. So that you would have 7 inches in the outside and 6-1/4 plus or (315) minus on the inside.

Q. What else did you measure, sir? A. I measured the configuration of the various—the mullions involved. As I said before, the mullion top and bottom is the same. The mullion at the right side, outside, or in this picture left side, the difference from the mullion at the side of the sliding door opening, that mullion measures 1-3/4 inches in width, as I said before. It has a protruding handle on the side 1-1/4 inches in depth.

Q. You mentioned a handle on the outside. Using PX-4, would you tell us what that is? A. Yes. This protruding lip here with the light colored edge is the door handle. There is no casting or handhold other than this extruded piece of aluminum which is employed as an opening device. You'd have to grasp it with your fingers and slide the door back.

Q. That is on the outside you are talking about? A. That is on the outside, yes.

Q. Go on, sir. A. I was concerned primarily with the outside and I spent most of my time examining the outside, measuring the door and examining the various optical angles that might be employed as someone approached this door. The dimensions, I have concluded most of the dimensions I have taken.

(316) Q. Did you also notice whether or not there was a handle on the inside of that door? A. Yes, there is a handle on the inside. You can see it in this photograph, right here. Or partially.

Q. Is that also exhibit in P-1? A. Yes. That's it.

Q. Where the red mark is indicated? A. Where the red mark of an arrow is, indicating the handle.

Q. What significance, if any, is there on the size of the track and the bottom mullion? A. There is a significance in this particular model door, because of the wide expanse of glass involved. The thickness of the mullion becomes important because of its relative depth or width as compared to the size of the door. This is what you call a low-profile mullion. It is a narrow mullion, the designer intending to reduce the effect of mullion as much as he could.

Q. So that you would have more glass expanse? A.

So that you would have more glass, yes.

Q. I was particularly interested in the relationship of the mullion and the track that appears on P-3. A. I pointed this out to you, sir, earlier—

Mr. O'Donnell: Objection.

(317) Q. Just tell us about it. A. In this particular door there is an optical illusion—

Mr. O'Donnell: Objection.

The Court: Sustained.

Mr. O'Donnell: I ask that the jury be directed to disregard the statement.

The Court: Yes, the jury is instructed to disregard the witness' statement about an optical illusion. That will be for the jury to determine.

Q. Tell us what you observed about that.

Mr. O'Donnell: Objection. "About that" is an ambiguous statement.

The Court: Unless it is established under what conditions he looked at it, from what angle, et cetera.

Mr. O'Donnell: Or if it was done at night.

The Court: That's what I meant by conditions. Mr. Conway: What time of the day was the witness there, your Honor, can we find?

Q. What time were you there? A. I was there approximately three or four o'clock in the afternoon.

Q. Was it daylight? A. Yes, it was.

Q. Based on your experience and your knowledge, (318) education and occupation, sir, are you able to tell us, sir, whether or not lighting conditions would in any way affect the visualization of these items, the glass and the mullion, et cetera, that you have described, that you have measured?

Mr. O'Donnell: Objection. Mr. Conway: Objection.

The Court: I think the question is too broad and vague. I will sustain the objection to the question as worded.

Q. Of what significance, sir, is the size of the glass in relation to someone standing out on the terrace?

Mr. O'Donnell: Objection. It is an ambiguous question.

The Court: I don't know what the question is designed to elicit that wouldn't be obvious to anyone. It seems to me that if you are driving at what I think you're driving at, you don't really need the question or the answer. You don't need a civil engineer to tell you that the smaller the frame the harder a door is to see. I think the jury can use their common sense about certain matters, including that.

Mr. Krimsky: What I'm talking about, if your Honor please, is the size of the glass and the significance of the size of the glass to someone who is standing out on the (319) terrace.

The Court: I don't believe that is necessary. I think that testimony about that is not necessary. The jury can use their own common sense and experience about matters of that kind.

Mr. Krimsky: I will ask this question and perhaps it might be clear or not, your Honor.

Q. Standing in front of that glass door and looking at it, at the glass door itself directly ahead, are you able, on the periphery of your eyes, to see the frame?

Mr. O'Donnell: Objection.

The Court: I don't think it has been established what his angle of vision is and what the angle of vision is of an average person. So that there is not a foundation laid. As to whether he could see it or not is immaterial.

- Q. How tall are you, sir? A. 5' 10-1/2".
- Q. Let me ask you this general proposition.

The Court: If you want to ask him what angle is subtended by the window frame, the two sides of the window frame is a position that would correspond to a position of the eye of a person standing with his back to the balcony, I would permit that, if he made any such measurements. If he didn't, I think the jury can estimate it as well as he can. (320) If he didn't make a measurement of that subtended angle or if it isn't established that his peripheral vision is average, then I don't think the testimony would be meaningful.

Mr. Krimsky: Thank you, sir.

Q. As a general proposition, sir, is it not true that the closer you are to a glass door of this size, the less chance or opportunity there is to see the frame?

Mr. O'Donnell: Objection.

Mr. Krimsky: I will withdraw that.

The Court: I think that is a matter of common sense.

Q. What effect would be created if someone were standing on the dark side of a glass such as this when there is light on the inside?

Mr. Conway: Objection. Mr. O'Donnell: Objection.

The Court: Read the question.

(Question read.)

The Court: Sustained.

Q. What significance or role does light play with respect to glass of this size?

Mr. Conway: Objection.

The Court: I think the question is too vague. I think it is so vague in fact as to be meaningless. I (320A) think that the reflection of light from a pane of glass is independent of the size. The reflection of any square inch is independent of whether that is the only square inch or whether there are a million square inches in a pane of glass.

Q. Speaking about reflection itself, would that be affected by lighting conditions?

Mr. Conway: Objection.

The Court: Read the question.

(Question read.)

The Court: He may answer that. I think it is self-evident, but he may answer it.

Mr. Conway: I object to this, your Honor. First of all, the witness was not there in the evening, he has no idea of what type of glass was there at the time, and there are many, many factors involved here that I don't think this witness has a foundation to testify to.

Mr. O'Donnell: I object to it, your Honor.

The Court: I don't think this question is an improper one because he is asking about a general rule of physics.

Mr. Conway: But there are many variants of that rule.

The Court: I understand. That is a matter for vour argument.

Mr. Conway: Exception. (321)

Mr. O'Donnell: I respectfully except, your Honor. The Court: This is going to be a yes or no answer, and your objections maybe are premature.

The Witness: I'm sorry, I didn't understand it as a ves or no question.

> The Court: Read the question, please. (Question read.)

A. Yes.

Q. Would you explain?

Mr. Conway: That is objected to. Mr. O'Donnell: I will object to that.

The Court: He can explain how reflection is af-

fected by lighting conditions.

Mr. Conway: Your Honor, this, I submit to you, is a complete generalization, has no particular bearing on the particular situation we have here. Unless we have some sort of a frame of reference for this particular accident, then I think it is meaningless.

Mr. O'Donnell: I join in that objection.

The Court: As to whether it is meaningless will depend on whether it is associated with the conditions which existed at the time on the evening of the accident. I think as a general proposition of physics he can state the way in (322) which lighting conditions affect reflection.

A. The illumination on the window and the relative illumination from both sides of the glass are extremely important in determining the effect of the optical illusion created by the glass.

Mr. O'Donnell: Objection. Move that that be stricken.

The Court: The reference to optical illusion is stricken.

Mr. O'Donnell: Move to strike the answer in that it is not responsive to the question asked. I ask that the jury be instructed to disregard the statement.

The Court: The objection is overruled.

Q. If the glass is placed between the illumination and the individual, what happens in that event?

Mr. O'Donnell: That is objected to.

The Court: I think that is too vague. A lot of things happen.

Q. With respect to observance of the glass, the individual's ability to observe the glass.

Mr. Conway: That is objected to.

Mr. O'Donnell: Objection.

The Court: I still don't like the form of the question, Mr. Krimsky. I know what you are driving at and I (323) think you are entitled to get to it, but you are going at it by a way which is not proper.

Q. Is visibility of the glass to the naked eye affected by the position of the height with respect to the individual, the glass and the height, the illumination?

Mr. O'Donnell: Objection.

The Court: Overruled.

Mr. O'Donnell: Your Honor, I object to that portion referring to the naked eye. Miss Kalschuer testified that at the time the accident occurred, it was nighttime, she was wearing glasses and she is nearsighted. I object to this man's testimony as to what the naked eye would see.

The Court: Rephrase the question to eliminate the word "naked," please, Mr. Krimsky.

Mr. Krimsky: Could I have that question read? (Question read.)

Q. You have heard the question. Eliminating from that question the word "naked"—

Mr. O'Donnell: Objection. This question can be rephrased in a proper manner.

The Court: Yes, why don't you rephrase it, Mr. Krimsky. It was a little awkwardly worded anyway.

Mr. Krimsky: I feel a little awkward right now, your Honor.

(324) The Court: Let me ask the witness this question, which I think is what you are driving at.

If a person is looking at a pane of glass, does the amount of reflection which he sees from the glass vary depending on whether the light is coming from behind him or from the other side of the glass?

Mr. O'Donnell: Objection. Mr. Conway: Objection.

The Witness: May I answer? Yes, it does, it varies considerably.

Q. In what way, sir?

Mr. O'Donnell: Objection.

The Court: You may answer.

A. The effect of illumination behind the glass with a viewer on one side and the illumination on the other is greatly affected in that the visibility from the brighter side of the glass causes reflectance. I can describe it this way: When you want to make a mirror—

Mr. Conway: The light from the other side causes reflectance?

The Witness: Yes. When you want to make a mirror out of a sheet of glass, you darken the other side of the glass, and reflect any light from the other side of the glass and it becomes a mirror. The same effect is created by looking in (325) a darkened room from daylight, you have a mirror image created on the glass because of the darkened background behind it. If you illuminate that background you cut out the reflectance of light from outside, and the glass tends to become invisible.

Q. So that if an individual is in the dark looking through a pane or at a pane of glass into a lighted room—A. Into a brightly illuminated room, the visibility of the glass itself is reduced.

Mr. O'Donnell: Objection, your Honor. The question has not been completed. I suggest that the attorney complete his question before the witness answers it.

The Court: I think the record may stand.

In the future, please, Mr. Flynn, wait until the question has been completed before you answer it.

Q. Did you complete the answer?

Mr. O'Donnell: There was no question, your Honor. The question wasn't completed.

The Court: I think he knew what the question was going to be. He jumped the gun and answered it.

Mr. O'Donnell: I object to the question and move the answer be stricken.

The Court: On what ground? That it is incomplete?

Mr. O'Donnell: That it was incomplete, did not give the attorney time to object, it was an improper question (326) and it was answered before it was completed.

The Court: Read the question please, Mr. Reporter.

(Question read.)

Mr. O'Donnell: I submit, your Honor, that was no question.

The Court: Why don't you rephrase the question, please.

Q. Is the visibility of the glass increased or deceased to an individual standing in a darkened area where the glass is in front of him and the light is beyond the glass?

Mr. Conway: Objection.
Mr. O'Donnell: Objection.
The Court: He may answer.

A. It is decreased in proportion to the relative illumination of both sides.

Q. Would you explain what you mean by that? A. Light is relative. It can be measured. Where the light is slightly less outside a glass than it is inside, the darkened side may be indistinguishable by eye, but can be measured. That would be an example of the relative illumination on two sides of a glass. Where you have a clearly defined difference, that is, nighttime outside and an illuminated room inside, the glass would tend to be less visible under those conditions than it would be during the daytime (327) when you have illumination on both sides of the glass.

Q. And is that which you just described evidenced on Plaintiff's Exhibit 2?

Mr. O'Donnell: Objection.

The Court: Sustained. This is a photograph, and the photograph doesn't necessarily reflect all the light values that were present or would be present to the naked eye, or to the eye.

Q. How would you characterize that kind of condition, that is, a door unmarked, a glass door with dimensions such as these, unmarked, and the physical findings are exactly like that, how would you characterize that kind of condition, in your field?

Mr. O'Donnell: Objection.

Mr. Conway: That is objected to.

Mr. O'Donnell: Both as to content and as to form.

The Court: Sustained.

Q. In your opinion, sir, is this a safe or hazardous condition?

Mr. O'Donnell: Objection.

Mr. Conway: I object to that.

The Court: Sustained.

Q. Mr. Flynn, I want you to assume the following facts to be true: I want you to assume that this individual, who is (328) approximately 5' 9" tall, standing on that terrace at approximately 11:00 p.m.; that the only illumination on that evening was that there was no light on the terrace, that there was illumination from a chandelier consisting of six bulbs of approximately 15 to 20 watts each, hanging from a chandelier in the center of that dining room, and that there was a table beneath that chandelier.

I want you to assume also that the glass doors at that time existed as they were one and the same as those that you measured and observed yourself.

I want you to assume further that the person was standing on the terrace towards the westernmost portion of the terrace and was a distance of six or seven feet walking away from the glass doors, walking towards the glass doors. I want you to assume that that dining room fixture was lit.

Do you have an opinion within a reasonable degree of certainty in your field as to what the visibility of that glass door would be at that time?

Mr. O'Donnell: Objection.

The Court: Sustained.

Mr. Krimsky: I have no further questions, your Honor.

Mr. Conway: Sit down, Mr. Flynn, make your-self comfortable.

(329) Cross Examination by Mr. Conway:

Q. Mr. Flynn, if somebody is out on a dark terrace and if they are approaching some plain glass doors and there is a light in the room behind them, that light obviously would reflect on that person's body as they approach the door, would it not?

Mr. Krimsky: Objection, your Honor. He is asking the same things that he wouldn't permit me to ask.

The Court: This is cross examination. I think it is self-evident, anyway. If light wasn't reflected from a person's body, the person would be invisible, so I think he can answer.

Q. Is that correct? Isn't that so? A. Yes.

Q. And the reflection from the person's body would then be shown in the glass door right in front of them, would it not? A. No. not necessarily.

Q. So that you are approaching a glass door and you have light shining on you that didn't reflect on the door in front of you? A. Not that the light is absorbed by you.

Q. What do you mean by absorbed? (330) A. There are

absorbent surfaces and reflective surfaces.

Q. How about a face? Is that absorbent or is that reflective? A. I would say that is asborbent. Your face

doesn't reflect off my face, so I'm looking at you. Can you see your face reflecting off mine?

- Q. I don't have a shine from your face shining at me, either. And if you did, it might very well reflect back at you? A. No, I don't think so.
 - Q. You have some doubt? A. No, I'm certain.
- Q. You have no idea of what this place looked like at night, do you?

Mr. O'Donnell: Objection.

- A. I have an idea, but I wasn't there at night.
- Q. You were not there at night to observe the place, were you? A. I was never there at night, no.
- Q. The chandelier that was in that room, do you have any idea what it looked like? A. Yes, I have a vague remembrance of it.
- Q. What does it look like? A. It was a decorative chandelier, an inverted umbrella-like (331) chandelier.
- Q. What color? A. I'd have to say I would guess at that color. I don't recall.
- Q. And an inverted chandelier with a candelabra going up? A. I believe so. That's how I recall it. That type of chandelier.
 - Q. Were there any shades? A. No.
- Q. So therefore you had unshielded bulbs? A. I believe so, yes. There was some reflectors of some type involved, too.
- Q. So that if you had these unshielded bulbs and you had a plate glass in front of it, they would—the door, they would reflect on the door, would they not? A. They would reflect on the door if one viewed them from inside.
- Q. If one viewed them from outside, wouldn't you also see a reflection of them? A. No, you would not. You'd be looking directly through the glass. Any reflection would be reflected from the inside surface of the glass.
- Q. And it wouldn't appear on the glass as you (332) approached it? A. No, it would not.

Q. Do you know what sort of a night the night of this accident was? A. No, I don't.

Q. I suppose if it was a full moon that might have an effect on somebody approaching a glass door, wouldn't it? A. Not on this particular balcony, it would not. The moon would be outside of the building. This balcony faces north. There would be no effect from the moon.

Q. None? A. None whatsoever.

Q. In other words, they may not be any glow from the moon reflected from the sky down? A. The building would interfere with any illumination from the moon. Where there is stray light from the city, which would be a factor, but—

Q. I'm talking about-

Mr. Krimsky: Let him finish the answer.

A. The illumination of the moon would not affect it.

Q. What do you mean by stray light from the city? In other words, that would show up on some people on the terrace? A. This comes under the description of relative illumination. This is stray light, background light, if you (333) will; in a city of this size there is stray light, background light which illuminates the night sky in a city. This light can be measured, it is not very much, but it is measurable.

Q. Would that reflect on a pane of glass? A. Relatively, ves.

Q. Which relatively? What do you mean? A. I mean if the illumination from the back of the glass, the inside of the glass, is a great deal brighter than the illumination provided from outside the glass, the effect, the relative illumination would govern which way the reflectance went.

Q. Certainly you would have some amount, regardless of the degree of it, depending on the amount of light there is. A. Yes. And I would say that it was enough so that you could see the balcony railing, you could

walk out on the balcony with the illumination and not fall off.

Q. Aren't you getting all over the place? You haven't the faintest idea of the amount of light that was there. A. I have a faint idea. That's what I'm testifying to.

Q. You have a faint idea, but you don't have any real idea of how it looked on the night of this accident? A.

My faint idea is very real to me.

- Q. That may be in your imagination, but as far as facts are concerned, you were not on the balcony that night. (334) A. I wasn't there during the night. I said that.
- Q. So that while you may have what you think is a good guess, that may not be the fact at all? A. I doubt that.
- Q. Would the light of the chandelier have any effect at all on reflection? A. Yes, it would.
- Q. Would the width of the dining room table have any effect on the reflection? A. Yes, it would.
- Q. Certainly if the chandelier was high enough and the table was small enough you would get a reflection from that light on that crosspiece on the step, wouldn't you? A. You would get a reflection of the type that would be normally reflected from a wood surface, which is a great deal less than a polished glass surface.

Q. On Exhibit 3, this piece of wood that is on the step inside, as one approached the door—

Mr. Krimsky: From which direction, sir?

Q. From the terrace side, would you see a reflection of that on that from the chandelier? A. Yes, you would.

Mr. Krimsky: Excuse me, your Honor. May we have an understanding as to what Mr. Conway means, a reflection of (335) light from the step onto the glass, or just a reflection from the step? The Court: He said a reflection from the step.

Q. Would that reflection from the step, if you had a piece of glass in front of it, that would reflect back up on the glass, wouldn't it? A. I don't understand what you mean by reflect back up on the glass.

Q. If you have the sill here and you have a piece of glass right in front of it, and you have a light coming down from a chandelier hitting a strip inside, would this not reflect back on the glass in front of it? A. It

could only be viewed from the inside.

Q. I am talking from the outside. A. It could not. It would not reflect—it could not be viewed from the outside. It would reflect upon, but could not be seen from the outside. But the reflected side will be seen from the same side as the light. The very word "reflect" means bounce back.

Q. Unless you are dealing with plain glass; is that

right? A. We are talking about—

Q. If you have a mirror, for instance, you would expect it to reflect back again in the direction it came from? (336) A. Yes, because all of the light is on the same side of the glass as you are. You are viewing it from the same side as the light.

Q. Where you have a piece of plain glass, that reflection appears on both sides of the glass? A. No, it does not. It only appears—reflect. The word reflect means to bounce back. It can only be seen from the same side that it originates from. Light transmits through glass. You don't see reflected light on the outside of a glass. You see it on the same surface, the same side as the illumination is provided.

Q. On this Exhibit 3 again, Mr. Flynn, in order to be able to see this track that the door runs in, if you are walking from the terrace into the dining room, in order to see that track, that door would have to be partially

open, wouldn't it? A. No, it would not.

Q. Could you see that track if the door was closed? A. Yes, you can see three inches of it with the door closed.

- Q. You mean the side of it? A. I mean the outside of the door track—the track itself is eccentric in the door saddle. The saddle protrudes three inches—that black line—
- (337) Q. Yes. If the door was closed that would be covered, wouldn't it? A. Yes, it would.
- Q. So that if one approached this opening from the terrace and could see a part of that track there, that must perforce mean that part of the door was open? A. No, it would not. The reason being, if I may continue—
- Q. Go ahead. I'm serious. A.—is that there is a black gasket on both sides of the glass, and that viewed at the same angle that you have that picture, the line of the black gasket on both sides of the glass closely resembles the black track.
- Q. Maybe you don't understand me, or I certainly don't understand you.

This track that we have here that seems to have several black lines in it. Correct? A. Yes.

- Q. The door slides over it, does it not? A. It does.
- Q. So that when the door is over it you can't see this line in the track, can you? A. You cannot see the black line of the track. What you see is the gasket which you may presume is the track.
- (338) Mr. O'Donnell: Objection. Move to strike that. The Court: I think it may stand.

Mr. Krimsky: If your Honor please, I think what the confusion is, is a question of semantics. He is talking about a track, meaning the groove. Mr. Flynn may be talking about the track meaning the groove. Mr. Conway is talking about the track meaning the entire width of this metal.

Is that correct, Mr. Conway?

Mr. Conway: I don't know what Mr. Flynn means.

The Court: I think you have the background. I think Mr. Conway is talking about the track as meaning the grooves and the witness is talking about it meaning the mullion.

The Witness: No, your Honor. If I may clarify it-

Q. I will show you Plaintiff's Exhibit 2. This is the movable door on this side here. Can you see it well enough from where you are? A. Yes.

Q. That door is closed there, isn't it? A. Yes, it ap-

pears to be closed.

Q. That door covers up the track, doesn't it? A. I don't know. I think that probably the track would be visible if it had been illuminated from a different angle. It is in a deep shadow in that picture.

(339) Q. Mr. Flynn, do you see the same thing in that picture, Exhibit 2, that you see here in Exhibit 3? A.

No. I don't.

- Q. Good. I don't either. The reason that you don't see this in that picture, 2; is because the door is over it; right? A. No. In the other picture the shadow of the lower mullion obstructs the track. In this picture the shadow of the lower mullion obstructs part of the track.
- Q. The bottom of the door that goes over that track is built in sort of a U sort of fashion, is it not? A. The bottom of the door has a key in it, an inverted U, if you will.
 - Q. It looks like a U, doesn't it, like that?

The Court: He said an inverted U.

Q. And that U goes over a track that is on the sill, over the track like that; right? A. No. The bottom of the door has a key, a single key. The track has a U, so that it rolls on one surface, not two as you describe. There is only one track, one recessed track in that saddle.

Q. And the door goes over that recessed track? A. It

goes in it, yes.

- Q. It goes in it and the sides go beside it? (340) A. That is correct.
- Q. So that when a door closes over this track, you get the part of the door riding along the top of the track and you get two sides on either side of the track? A. That's correct.
- Q. So that when you close a door similar to the one in 2, it is over and on both sides of the track? A. Yes.
- Q. And the track we are talking about is this track that is shown in 3? A. The black line in that 3 is the track.
 - Q. The black line? A. Yes.

Mr. Krimsky: Not the entire mullion? The Witness: Not the entire saddle.

Q. I'm not talking about the entire saddle, and I never was. You have five or six inches of wood on one side and five or six inches of stone on the other side.

Mr. Krimsky: He is talking about the entire saddle.

The Witness: I am clear on what Mr. Conway is asking. He is talking about the track, and I am, too.

Mr. Krimsky: You mean by track-

Mr. O'Donnell: I object to counsel arguing with the witness.

(341) Mr. Krimsky: Maybe I can help to clear something up.

The Court: I think it is clear now.

Mr. Conway: Let me fumble around, please.

Q. On either side of this track we are talking about that the door rides on, there is on one side a five or so inch piece of wood, and on the other side a five or so inch piece of whitish masonry of some kind? A. That's correct.

Q. And the door goes along the middle of that piece of wood and the middle of that piece of masonry, whatever it is, marble, masonry—what is it, incidentally? A. It is masonry. It is stone, sandstone.

Q. All right. I think it looked white enough to be marble, but it isn't, it is sandstone, a lightish material?

A. Yes.

Q. So the track goes between the outside lip and the inside lip? A. I think you are losing me. In the first place, the wood is not five inches, it is eight.

Q. This part here, what do you call that? A. That is the inside sill. That is 8-3/8 inches. There is a sad-

dle next to it which is 4-1/2 inches.

Q. You mean this? A. Yes. Part of that saddle can be viewed from inside (342) the door if the door is shut, just a very small part, about half.

That is a 3-inch saddle, and all three inches of it can

be viewed when the door is closed.

Q. And also when it is open? A. Yes.

Q. In between this three-inch piece of white masonry out there and this eight-inch wooden board, is this track that we are talking about? A. Right. Approximately one inch in from the inside edge of the track, so it is not centered, but eccentric.

Q. Then the door when it closes over here covers up

this track? A. Yes, it does.

counsel.

Q. So that if anyone approaching a door from the outside that could see the track or part of the track, it meant that the door was open or partially open? A. If they could see the track and distinguish the track from the gasket—

Q. Will you answer my question, Mr. Flynn, without trying to evade it?

Mr. Krimsky: I object to the characterization by

Mr. Conway: I withdraw it.

(343) Q. Anybody approaching that track from the outside that could see the track meant that the door was opened to some degree? A. Yes.

Mr. Conway: That's all.

Cross Examination by Mr. O'Donnell:

Q. Mr. Flynn, you told us what the word "reflect" meant. What does the word "refract" mean to an engineer? A. Refract?

Q. Yes. A. Refract is almost synonymous with the word reflect. Refract pertains primarily to the study of illumination. Reflections means diffusion of light. It has a wide—it has been awhile since I took physics—refracted light can be broken down in its various components.

Q. When this light would shine from the chandelier onto the glass patio door, would the presence of ordinary New York City dust or dirt or raindrops increase the visibility of this closed door to somebody on the outside of the door? A. To somebody outside with dark illumination on the outside?

Q. Yes. A. It may, yes.

(344) Q. It would? A. It may.

Mr. O'Donnell: That's all. Thank you.

Re-direct Examination by Mr. Krimsky:

Q. That would have to depend on how much dirt, et cetera? A. Yes.

Q. For my own edification, sir, when you were talking about the track, were you talking about the groove here, or the entire width of this metal? A. I was talking about the black line which is the same thing that Mr. Conway was talking about. The dark black line that appears in

that photograph is a recessed track. It is dark because it is in shadow.

- Q. What do you call this metal here, the entire metal?

 A. I call it the door saddle.
- Q. How much of the door saddle, what is the distance of the door saddle from the track to the outside? A. Three inches.
- Q. So that if the door were closed, could you then see the door saddle? A. Yes.

Mr. Krimsky: That's all.

(345) Re-cross Examination by Mr. Conway:

Q. Were you referring to the saddle, Mr. Flynn, as just that track along there? A. No. I made a distinction between a saddle and a track. I think you were talking about the dark line that shows in that photograph as the track.

Q. Correct. A. And the saddle is the entire aluminum

piece which the track belongs in or fits in.

Q. Which is covered by the door when it is closed? A. You use the word "covered." It doesn't totally cover the saddle. It covers only the thickness of the door. The saddle is four inches, the door is only an inch and an eighth in width.

Mr. Conway: Thank you.

Mr. O'Donnell: No further questions.

The Court: Thank you, Mr. Flynn.

(Witness excused.)

The Court: We can take a 10-minute recess.

(The jury left the courtroom.)

(Recess.)

Colloquy

(In open court; jury present.)

Mr. Krimsky: If your Honor please, at this time I (346) would offer into evidence the following, which are portions of the lease for this apartment.

The Court: Why don't you offer the entire lease?

Mr. Krimsky: I don't want to do that in this case, your Honor, in my case.

The Court: I think if the opposing attorney insists, you will have to offer in the entire document. You can't offer in a part of a document; if they object.

Mr. Krimsky: Excuse me, your Honor. It was attached to answers to interrogatories and if that is so, it is my understanding and you can correct me, sir, that I can offer any part to any answers to interrogatories.

The Court: Answers to interrogatories are on a different basis because each one is an entity unto itself. But if you are going to offer a document, unless the opposing counsel consent to your offering a part of it, then you have to offer the entire document.

Mr. O'Donnell: Your Honor, I have in my possession the original lease between Jack Rounick and 215 East 68th Street, Inc. which I will furnish to counsel if he wishes to offer it into evidence.

Mr. Krimsky: I haven't read the entire lease, your Honor, and at this time I will not offer—if your Honor is ruling that I cannot offer parts of the lease, and would have (347) to submit the entire lease at this time, then I would respectfully decline and ask for an exception on that part.

The Court: You may have your exception. You don't have to offer it until you have read it. You haven't closed your case yet. We will be breaking

Colloquy

for lunch in 40 minutes. If you want to read it over the lunch hour and offer it after lunch, you may do that. But a lease like any other contract is an entirety, you can't pick out one provision of a contract and offer it in evidence to the exclusion of the rest of the contract which may modify or explain it unless opposing counsel consents to your doing this.

Mr. Krimsky: With this exception, your Honor, most respectfully, sir, we want to show that the landlord had certain rights with respect to—I don't want to go into specific before the jury, but he did have certain rights under the terms of the lease, and I just want to show that he had those particular rights.

The Court: I think you've got to also show what responsibilities and obligations he had, and what responsibilities and obligations the landlord had. It is a bundle. You can't show one stick from the bundle and say that is the bundle.

Mr. Krimsky: Except this, sir, that some of those rights that the landlord may claim may very well not be— (348) I didn't want to argue law in front of the jury. May we have this discussion after this, after I offer the following?

The Court: We are not going to have any more discussion until you offer it again. The matter is closed. I have ruled on it, as far as the lease is concerned.

Mr. Krimsky: I will be given an opportunity to read it, your Honor?

The Court: Surely.

Mr. O'Donnell: Yesterday when the lease was delivered to me, I gave counsel—I gave him this copy of the lease and he read it at that time. I now have the original lease in court. He's had an

opportunity to examine it. The interrogatories that you refer to were interrogatories answered on behalf of Defendant Rounick and not on behalf of Defendant 215 East 68th Street, Inc.

Mr. Conway: The entire lease was included in that.

Mr. O'Donnell: Unfortunately it was a copy of a lease dated at a different time and not the one in effect at the time the accident occurred. I have the original lease here, it speaks for itself, and I am offering to provide it to counsel so he can enter it as part of his case.

Mr. Krimsky: If your Honor please, I'd like to correct one statement. When that lease was supplied to me, Mr. O'Donnell stood right here beside me and I compared (349) certain sections of that lease with the sections that were attached in the interrogatories. He knows and I know that I did not read the entire lease. I did not have an opportunity.

The Court: You are going to have your opportunity to do so.

Mr. Krimsky: I thought he was objecting to that. The Court: If he is, I am overruling the objection. You are going to have an opportunity to read the lease over the noon hour as I indicated and to offer it before you close your case, if you want to offer it as an entirety. If you don't want to offer it as an entirety, I won't accept a part of it, unless counsel consents.

Mr. Krimsky: Thank you. I have one more line, it will just take a second.

The Court: One more line of what?

Mr. Krimsky: Of part of a deposition that was taken of the defendant Jack Rounick.

The Court: You can go ahead with that, if you want to, or call another witness, whichever you want to do.

Mr. Krimsky: I have no other witnesses, your Honor.

The Court: All right.

Mr. Krimsky: This is from the deposition of JACK ROUNICK dated July 5, 1972—excuse me, the notice was dated July 5, 1972, but the deposition was taken on the 23rd day of (350) January, 1973, at the offices of McLaughlin, Fiscella & Gervais, Mr. O'Donnell's firm. And present at that time was an attorney from Mr. Landau's office, and Mr. Paterson, appearing for Mr. McLaughlin's office, and Mr. McGuire, appearing for Mr. Coughlin's office. All parties were represented. I offer the following question and answer, page 7, line 18, sir:

"Q. All right,"—this was a question posed to Jack Rounick.

"Q. All right, given the situation that the patio was unlit and it is nighttime outside and the inside or the interior of the apartment is light, can you see the insert in which you must put your hand in order to open the door?"

Mr. O'Donnell: Objection.

The Court: Sustained.

Mr. Krimsky: I then offer the following admission by Jack Rounick-

Mr. O'Donnell: Objection to any characterization of any kind.

Mr. Krimsky: The following statement by Jack Rounick.

The Court: The jury is instructed to disregard the word "admission."

Mr. Krimsky: Line 25, page 7:

"It would be impossible"—

(351) Mr. O'Donnell: Your Honor, he is reading the answer to the particular question which you just sustained an objection to, therefore I object to counsel—

Mr. Krimsky: Isn't that an admission on the part of Jack Rounick, sir?

The Court: If it is not in response to the question then it is volunteered. I can't permit it because it deprives counsel of the opportunity to object to the question.

Mr. O'Donnell: Your Honor, it is in response to the question—

Mr. Krimsky: I will withdraw that, your Honor, in light of your Honor's ruling. The only thing that I have left—

Mr. Conway: May I read one question and answer, your Honor?

The Court: You may. That is from the same deposition.

Mr. Krimsky: If your Honor please, I object to any question and answer being read by Mr. Conway. He represents the defendant Jack Rounick whose deposition was taken. There is no testimony that Jack Rounick is not available at this trial. And they may be self-serving declarations. Certainly that deposition of Jack Rounick—

Mr. Conway: Since you started the examination, sir, I'm entitled to read it.

(352) Mr. Krimsky: I have offered part of it. I just withdrew all of that in light of your Honor's ruling.

The Court: You read nothing from the deposition?

Mr. Krimsky: I read nothing from the deposition that was accepted into evidence.

The Court: All right. Then I will sustain the objection to reading any part of it.

Mr. Krimsky: I have no other evidence with the exception, your Honor, of offering into evidence the W-2 forms, which is P-11. It has not been previously offered.

The Court: Is there an objection to P-11?

Mr. Conway: Yes.

The Court: On what ground?

Mr. Conway: I don't see anything material about them.

The Court: I will overrule the objection. They may be received.

(Plaintiff's Exhibit 11 received in evidence.)

Mr. Krimsky: With the exception of whether or not I offer the lease into evidence, we have no further evidence.

The Court: All right.

Mr. Conway: Your Honor, could I with your permission recall Miss Kalschuer for a couple of questions?

The Court: You may.

(353) Mr. Krimsky: In his case?

The Court: Yes, that is in his case. She is of course being examined as an adversary witness, however.

Renee Kalschuer, a Plaintiff, Direct

RENEE KALSCHUER, previously sworn, resumed the stand and testified further as follows:

The Clerk: Miss Kalschuer, you are continuing under oath. Please be seated.

Direct Examination by Mr. Conway:

- Q. Did you have a key to the Rounicks' apartment prior to this accident? A. At the time of the accident?
 - Q. Yes. A. Yes.
 - Q. So that you could come and go at will? A. Yes.
- Q. What day of the week was July 10? A. I don't know. I know it was a week day.
 - Q. It wasn't a weekend? A. Right.
- Q. Did you plan on going on "go-sees" the following morning? A. Yes.
 - Q. I can't hear you. (354) A. Yes, I did.
- Q. Your accident was at 11:30 and you were prepared to go out to some discotheque that night, were you? A. Yes.
 - Mr. Krimsky: There is no testimony that the accident was at 11:30, your Honor. I think it was 10:30 or 11:00.

Mr. Conway: The hospital record says 11:30.

The Court: That is some time after the accident, Mr. Conway.

Mr. Conway: The history says 11:30, your Honor. She got to the hospital at 1:30. I offer it in evidence, sir.

The Court: That will be Defendant Rounick Exhibit C.

(Defendant Rounick Exhibit C received in evidence.)

Q. Miss Kalschuer, if Dr. Dick or Dickinson, either one, put in the hospital record that you walked through a glass door at home at 11:30 p. m., would that refresh your

Renee Kalschuer, a Plaintiff, Direct

memory that that is about when it happened? A. I don't remember what time it was.

Q. You had planned on going out to a discotheque that night, had you not? A. We had planned on going somewhere, yes.

Q. I'm sorry? A. Yes.

Q. And you were then going out to have photographs (355) taken the following morning? A. Possibly. I was going on "go-sees."

Q. On "go-sees," that is when you hoped that some photographer would take a picture of you, wasn't it? A. They don't generally do it at that time. They set up appointments.

Q. But you were there making your best impression as a fresh face when you were on a "go-see"? A. Yes.

Q. Have you ever checked in the New York red book in the classified pages under "Model-live," to see the number of agencies there are in New York? A. No, I haven't.

Mr. Conway: Thank you.

Mr. O'Donnell: No questions. Thank you.

The Court: Thank you.

(Witness excused.)

Mr. Conway: Your Honor, will you take judicial notice that July 10 was a Wednesday?

Mr. Krimsky: July 10, 1968.

The Court: Is there any dispute about that, Mr. Krimsky?

Mr. Krimsky: I have no idea, but I don't think it matters. If that's what Mr. Conway says—

(356) Mr. Conway: Your Honor, I show you a perpetual calendar—

The Court: Show it to Mr. Krimsky. Perhaps he will stipulate to it.

(Pause.)

Mr. Krimsky: Yes, sir, July 10, Wednesday. Do you agree?

Mr. O'Donnell: I have already verified it, thank you.

Mr. Conway: He has a very personal way of verifying it. He got married the day before.

The Court: I don't know who had the worst accident.

Mr. O'Donnell: I am well treated.

The Court: Are you ready to call another witness, Mr. Conway?

Mr. Conway: Not now. Has the plaintiff finished his case?

The Court: Yes, the plaintiff has rested except for possibly offering in the lease which he is going to let us know about right after lunch.

Mr. Conway: Can we make some motions?

The Court: You may make a motion if you wish out of the hearing of the jury, I assume.

Mr. Conway: Yes, sir.

(357) The Court: Let me ask this, because I don't think the motions will take long. Have you got a witness to call after the motions?

Mr. Conway: I do not, sir.

The Court: Are you going to call any witnesses? Mr. Conway: No. sir.

The Court: Are you going to call any witnesses, Mr. O'Donnell?

Mr. O'Donnell: Yes, your Honor, I am, but my plan of campaign in this case calls for my case to start after the entire completion of the plaintiff's case, and my strategy depends on whether or not he introduces this lease or not. Therefore I'd like to have him examine it now and introduce it before I make my motions at the end of the plaintiff's case.

The Court: We will excuse the jury now a little early for lunch, and we will move up our time

schedule accordingly. We will come back at 1:45 after lunch.

The jury is excused now. We will hear the motions.

(The jury left the courtroom.)

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The Court: You can proceed with your motion, Mr. Conway.

Mr. Conway: What's he going to do with the lease? Is he going to put that in before the end of the case or not?

The Court: Is that going to affect your motions? Mr. Conway: It may.

Mr. O'Donnell: It will affect mine, your Honor, definitely.

The Court: How will the lease affect your motions, Mr. Conway?

Mr. Conway: For one thing, there is a provision in there that we are not allowed to do any alterations or changes in the apartment without the landlord's express written consent.

The Court: Insofar as any motions that relate to the lease are concerned, you may defer making those until after Mr. Krimsky has had an opportunity to review the lease and to indicate whether or not he is going to introduce it, which I will call upon him to do immediately when we come back at 1:45. But if you have any other motions—

Mr. Conway: Yes, I have. I have a motion to dismiss.

The Court: Go right ahead, sir.

Mr. Conway: Then Mr. Krimsky has rested.

Mr. Krimsky: Excuse me. Is counsel permitted to make a motion to dismiss after he's offered evidence?

The Court: That is a very good point. He did call a witness before he made his motion. I will permit him to make a brief motion.

Mr. Conway: Thank you, sir.

On behalf of the defendants Rounick, your Honor, (359)I move to dismiss the complaint, since this is a diversity case, we therefore are deciding this on New York law. The testimony here shows that Miss Kalschuer was not only a social guest but in effect she was a member of the family, she had been given a key and had been given the right to come and go as she wanted. The obligation of the host, Defendant Rounick, is only as to a person in Miss Kalschuer's status of a social guest or a member of the family. She is not entitled to any greater protection than members of the family. Our only duty is to use reasonable care to disclose any danger known to him, but not likely to be discovered by Miss Kalschuer. We do not have to guard against the remote possibility of the happening of an accident which could not reasonably be foreseen or anticipated. That is fundamental New York law.

In this case, Miss Kalschuer has testified that she knew about the door, that not only did she know about it, but she in fact had opened it four or five or ten minutes at least before this incident occurred. The Rounicks were not in the apartment at the time, she was there with a couple of friends of her own. Certainly there was nothing about the door that was a hidden trap known only to the Rounicks and not discoverable and not discernible by Miss Kalschuer. She knew the door was there because she was the one who opened What (360) happened in the meantime we are not quite sure, except that apparently some friend of hers, not the Rounicks, some friend of hers closed this door. She then, without using her sense of sight, ran when the phone rang, as somebody told her, and she rushed and ran through this door

without observing it. Just that simple. She wasn't paying attention to where she was going or what she was doing. She was obviously more interested in the boy that was there plus the phone that was ringing, and was not paying attention to what she was doing. She went into this door with such force that she shattered it and still ended up on her feet on the other side. She took absolutely no care for herself. I submit that first not only are the Rounicks not negligent in any way under New York law, but that she herself is guilty of contributory negligence as a matter of law, and I ask for a dismissal.

The Court: I will deny your motion. I believe there are questions that should go to the jury.

Mr. Conway: Exception, sir. I renew the motions I made.

The Court: I deny the motions again.

Mr. Conway: I respectfully move for a directed verdict here.

The Court: I deny that motion.

Mr. Conway: Exception to all your rulings, your Honor.

(361) The Court: Certainly. Do you have any present motions, Mr. O'Donnell, or is your only motion one as to whether or not the lease is to be introduced?

Mr. O'Donnell: I have a number of motions, your Honor, based on the facts and on the lease. I would prefer to reserve my motions until the end of the plaintiff's case until the case has been actually completed and the lease is offered.

One of the points we brought out in our brief and one of the circumstances in the case is that the building owner, 215 East 68th Street, Inc., was an owner out of possession of the apartment and custody, occupancy and control of the apartment—

The Court: Are you making an argument now or are you telling me why you don't want to make it now?

Mr. O'Donnell: That is why I don't want to make it until the lease is entered.

The Court: We will adjourn now for lunch until 1:45, and when we come back, Mr. Krimsky, I will call on you for a statement immediately as to whether you are going to offer the lease, and then we will hear from Mr. O'Donnell on his motions, if any.

Mr. Krimsky: Will you provide us with a copy over lunch?

(362) Mr. O'Donnell: Your Honor, I'd like to keep the original in my possession. I have a copy now, I would ask him to compare it and read it over lunch.

The Court: I think you can trust him with the original lease for an hour and 15 minutes.

Mr. Landau: We will keep it in the courtroom. It won't leave the courtroom.

The Court: All right. That will save the time of having to compare it with an accurate copy. We are adjourned until 1:45.

(Luncheon recess, 12:30 p.m.)

(363) Afternoon Session 1:45 p.m.

(In open court; jury not present.)

The Court: Mr. Krimsky, are you going to offer in evidence the lease?

Mr. Krimsky: No, sir. The plaintiff rests.

The Court: All right.

Do you have any motions to make, Mr. O'Donnell?

Mr. O'Donnell: Yes, sir. At this time I do.

The Court: All right.

The defendant 215 East 68th Mr. O'Donnell: Street, Inc. moves to dismiss the derivative cause of action of Miss Kalschuer's parents for loss of services and medical expenses on the ground that it has not reached or could conceivably reach the \$10,000 diversity jurisdiction amount required for jurisdiction in this case.

The Court: I will reserve decision on that.

Mr. O'Donnell: With respect to the defendant on both causes of action, on the primary cause of action of Miss Kalschuer herself, I respectfully move to dismiss on the ground that there is no jurisdiction on the ground that her cause of action does not conceivably could not reach the jurisdictional requirement of \$10,000 applied to jurisdiction in the federal court.

The Court: I will deny that motion.

(364)Mr. O'Donnell: I respectfully except, sir.

> With respect to Defendant 215 East 58th Street, I respectfully move to dismiss both causes of action on the ground that the owner and lessor, 215 East 68th Street, was a landlord out of possession and was therefore not responsible under New York law for injuries resulting from conditions in the demised premises. The criterion for liability of an owner out of possession and occupancy and control, based upon the cases I have cited in my brief submitted to your Honor Friday at the time that this case started, the liability must be based on occupancy and control and there has been no testimony in this particular case that the defendant 215 East 68th Street, Inc. had any control at all over the apartment in which the accident oc-There has been no testimony at all in curred. this case of control by the owner who was out of

possession. There has been no reference to a lease, there has been no testimony as to who controlled the apartment.

The Court: It has been stipulated, as I understand it, or I believe in fact admitted in the answers that the defendant 215 East 68th Street is the owner of the apartment house, and I think that shifts the burden of showing the absence of control from the plaintiff to the defendant, so I will deny that motion.

Mr. O'Donnell: I respectfully except, your Honor. (365) May I say that I believe the law requires that the plaintiff prove each and every part of his case, and that part of the case to be proved against the defendant 215 East 68th Street is that they had actual control of the premises. I believe the portion that your Honor refers to was part of the answer of the defendant 215 East 68th Street, in which it admitted ownership but denied occupancy and control and maintenance of the apartment. It admitted occupancy and control only of the areas used in common, and if I may for a moment look at my answer, I'd like to read that in its entirety with the portion of the complaint to which it refers.

Your Honor, may I submit my copy to you for a moment? It is paragraph 4 and the answer is paragraph 2. It is the second paragraph of the answer, sir, in answer to paragraph 4 of the amended complaint. At that point we admit ownership and admit only control of areas used in common. Therefore, I submit under the law of New York, in order for an owner out of possession to be liable for a condition within the demised premises he must occupy and control, which has not been proven in this case.

150a

Motions

(366)

The Court: Do you want to be heard on that, Mr. Krimsky?

Mr. Krimsky: May I defer to Mr. Levy, who has done a thorough job of research on this point.

Mr. Levy: Your Honor, first of all, the statement of counsel is not correct on the law of New York. But before I get to that, your Honor, the testimony on behalf of the plaintiff is that the tenant, Lois Rounick, notified the repairman of the building that there was a dangerous condition existing on the building. The landlord is then notified of the hazard and has a duty to repair it. In fact, the agent, the chief maintenance man. Archie, admitted or promised that, "We will take care of it, don't you repair, we'll take care of it." But more than that, your Honor, Section 78 of the Multiple Dwelling Act specifically changes the common law that Mr. O'Donnell refers to. Section 78 must be strictly construed. It specifically states that the owner or landlord of a multiple dwelling which an apartment house is defined, is included in the definition, has the responsibility to repair any dangerous condition existing on the premises not only the common passageways or the common areas, but included in the apartment itself.

A case on point is *Rodriguez v. Levine*, 232 New York Suppl. 2d 108, that is 1962. And the Multiple Dwelling Act referred to, dwelling law eferred to, is in 35-A, McKinney's Laws, Section 78 under "Repairs."

The Rodriguez case said that the owner and/or landlord of a multiple dwelling has a duty to repair a dangerous condition existing in a tenant's apartment after (367) the owner and/or landlord receives actual or constructive notice of the condition. The Rodriguez case dealt with a ceiling that was peeling in the apartment, and that the

tenant said to the landlord, there is a dangerous ceiling there, someone is going to get hurt. And the law said, the court said, the Appellate Court of New York said that that imposed, the act, the Multiple Dwelling Act imposed a duty on the landlord occupying out of control, in control, whatever, as long as he had notice of the defect or the dangerous condition.

The Court: Do you want to say anything further, Mr. O'Donnell?

Mr. O'Donnell: Oh, yes, your Honor. The section-

Mr. Krimsky: There is one more case, your Honor.

The Court: Excuse me. Had you finished, Mr. Levy?

Mr. Levy: No, I haven't.

Your Honor, there is a series of cases indicating that this is applicable, but I will reserve—

Mr. O'Donnell: No, I expect you to continue, then, and I will continue with mine when you are finished.

Mr. Levy: All, right.

The duty of care defined under the act by the case of Forrest v. United States, 324 Fed. 2d 1195, 1969, said that the owner of a building has the burden of showing that he has so completely parted with possession and control that he is (368) unable to perform his statutorially imposed duty of care. And this said that, and in this case we have a situation where the landlord not only did he have a key to the premises, but his employees were coming in there repairing it. There is not a situation—the owner and landlord has admitted that they controlled every part of that building except the demised premises, so therefore they certainly, and it is up to them, their burden, to show that

they were out of control. That case was with respect to the control of the premises.

And in the case of Tkach v. Montefiore Hospital, this is a situation where the owner leased the entire building to a tenant, that there was a dangerous condition in the building, the owner was out of possession, but he reserved in a lease the right to go in. So that he didn't have this complete inability to correct the situation. And the Appellate Court of New York said under the act, to say that the landlord or owner would not be responsible would be to obliterate Section 78 of the Multiple Dwelling Law. And then, your Honor, so that your Honor is clear that this law does change the common law in Rodriguez, the case I cited before, it said by virtue of Section 78 of the Multiple Dwelling Law, imposing upon an owner of a multiple dwelling the duty of keeping every part of the premises in good repair, sufficient liability imposed that common law for injuries resulting from failure (369) to keep in repair those portions of the multiple dwelling used in common was extended to cover injuries occurring in a tenant's apartment.

So it is clear, your Honor, that the Multiple Dwelling Law in New York, and it has been cited in numerous cases, hundreds of cases, it is applicable, has extended a landlord's responsibility to make repairs, and that responsibility, your Honor, goes to the tenant, the tenant's family and any social visitors of the tenant.

The Court: Thank you.

Mr. O'Donnell: Yes, your Honor. The case is cited in my brief, DeClara against Barber S/S Lines, 309 New York 602, Noble v. New York City, 289 N. Y. 106, Scuddero v. Campbell, 288 N. Y. 328, are all Court of Appeals cases and have been de-

cided long after Article 78 or Section 78 of the Multiple Dwelling Law went into effect.

In those cases it has been cited that it is necessary for the evidence to show and justify a conclusion that control has been in fact retained by the landlord. It is my contention that Section or Article 78 of the Multiple Dwelling Law has no application to this situation. There has been no testimony in this case that the defendant 215 East 68th Street ever retained a right of re-entry.

(370) Mr. O'Connell: But there has been no testimony other than the fact that they have a key that they retained a right of re-entry, and the cases state that a reservation of a right of re-entry to make repairs without a concomitant covenant to do so will not permit a finding of such control to hold a landlord. And I refer the Court to Dick v. Sun Bright Steam Laundry Corporation.

The Court: These are cases cited in your trial brief?

Mr. O'Donnell: Yes, sir. That citation is 307 N. Y., a recent case, well after the Article or Section 78 was in effect. 307 N. Y. 422. And Apple v. Muller, 262 N. Y. 277, and Cullins v. Guest, 256 N. Y. 287. All those cases show that there must be a reservation of right and an obligation that the landlord has retained to enter, and since the plaintiff must prove each and every part of his case against the defendant, it is incumbent upon him to prove that the right to repair was in fact retained.

We have offered the lease to the plaintiff to introduce in evidence if he wishes to justify and show the exact relationship between the parties, and counsel has refused to do so. And therefore I move that because of the fact that there has

been no evidence of possession or occupancy or control of the premises by the owner, this complaint should be (371) dismissed to the defendant I represent.

The Court: May I ask you this: In any of those cases that you cited, was there a situation in which the alleged dangerous condition pre-existed the making of the lease, or did those cases all concern situations in which the dangerous condition arose after possession of the leased premises was turned over to the tenant?

Mr. O'Donnell: You see, your Honor, in this case—I will answer your question, but may I say this: There has been no testimony in this case that this was a dangerous condition. Plaintiff's expert was on the stand—

The Court: Answer my question first. Did any of those cases involve a condition which pre-existed the making of the lease?

Mr. O'Donnell: Your Honor, I think, and I'm not sure, I think that the conditions arose afterward.

The Court: I rather think so, too, and I think that may change the situation, because obviously if the landlord does not have the right to go onto the premises and the duty to go onto the premises to discover and repair dangerous conditions that arise after possession is turned over to the tenant, that would obviously free the landlord from responsibility. But if the condition pre-existed the making of the lease, that could very well change the situation and would (372) logically seem to do so.

I will reserve decision on your motion.

Mr. O'Donnell: May I say also, your Honor, that there is an obligation upon the landlord only to advise a tenant of defects which are not open

and notorious and which are not visible to the naked eve and which would cause a health or hazardous condition. At the time this building went up, this window was here, this doorway was here. At the time the Rounicks took possession, this door was in the same condition as it was when the apartment was leased to him in 1962. There were no decals or markings on the door at that time. The whole substance of the plaintiff's case, it seems to me, is that the door was not properly The expert engineer that the plaintiff produced to testify in this case, his testimony only concerned the look of the door itself. He never testified that it was in fact defective, he never testified that it was poorly maintained, he never testified that there was a defect in design. All he said was that you could look through the glass. And I respectfully submit, sir, that that is not enough to hold a defendant in this case, and I again renew my motion to dismiss at the end of plaintiff's case on the ground that he has shown no negligence on behalf of Defendant 215 East 68th Street and has failed to show occupancy and control such to impose (373) liability on the owner of the building out of possession.

The Court: With respect to your motion relating to the absence of control, I will reserve decision. With respect to your motion insofar as it concerns the absence of negligence as a matter of law, I will deny that motion.

Mr. Krimsky: Your Honor, with respect to right of control, may I just point out to your Honor that the witness for the plaintiff testified that two things that meet the requirement that were set forth in the cases—

The Court: You don't have to summarize his testimony. I have heard it all and I have already

reserved decision on the motion. I have his testi-

mony very firmly in mind.

Mr. Levy: Your Honor, Mr. O'Donnell noted that the cases he was citing to you came after the passing of the Multiple Dwelling Act. However, he forgot to tell you that the cases that he mentioned do not deal with multiple dwellings.

Mr. Conway: Scuddero did.

Mr. O'Donnell: Yes.

Let me go on, your Honor-

The Court: Do you have another motion?

Mr. O'Donnell: Oh, yes, sir. I have several, your Honor. I move to dismiss both causes of action on the (374) ground that the plaintiff has failed to show any evidence of negligence on behalf of the owner 215 East 68th Street. In the absence of a showing of faulty construction or improper maintenance or a defect, the case must be dismissed. And I refer the Court to Cooper v. Scharf, 11 A. D. 2d, Appellate Division 2d, 101, 202 N. Y. Supp. 2d, '62.

The Court: Was that a glass door case?

Mr. O'Donnell: Yes, sir, it was. I also refer the Court to Luciano v. Maypart, Inc., 14 Appellate Division 2d 843, 220 N. Y. Supp. 2d 846. Gardino v. H. S. Barney Company, Inc., 17 Appellate Division 2d 893; 233 N. Y. Suppl. 2d 686, and Vella v. Seacroft Tours, Inc., 32 Appellate Division 2d, 813, and 302 New York Supp. 2d 451.

The Court: Those are all glass door cases?

Mr. O'Donnell: Yes, sir, I believe they were. I have the photocopies here, I could check if you want.

The Court: That's all right. We will look at

them and I'll reserve decision.

Mr. O'Donnell: With respect to the glass door cases, it seems to me that the plaintiff's whole

basis of action is based upon an idea that there was an illusion of space created because there was no marking on the door. The cases in New York which refer and have allowed recovery because of illusion of space, and I contend in this case that there is no (375) evidence of an illusion of space and that this is not an illusion of space case, but I contend that in every case in which an illusion of space case has permitted a recovery, there was a change in the actual condition of the physical item involved between the time that the plaintiff passed through the area and the time that she returned. And the two leading cases for that are Shannon v. Broadway and 41st Street Corporation, 242 Appellate Division 1029, and it was affirmed in 298 N. Y. 589.

In that case a formerly unobstructed passageway which had existed for a period of time was suddenly blocked by a glass partition that was unmarked. And the Court held in that case that the plaintiff in passing had a reasonable right to expect and be warned that this passage was blocked.

That is not the case in this situation where there was no blocked passageway at the time the plaintiff herself opened the door, of which she herself had control at the particular time involved; passed through it, and five to ten minutes later returned.

The Court: Then there was a blocked passage, when she returned.

Mr. O'Donnell: The physical condition of the door and the passage had not changed in that it was still the very same door that she opened in order to enter.

(376) The Court: But the physical condition of the passage had changed. In the first case it was empty and the second case it was blocked.

Mr. O'Donnell: Yes, but she had warning, your Honor, that there was a door there and she should, as an intelligent young woman, realize that doors are sometimes closed and sometimes opened. And this condition was neither caused by the owner nor the tenant. In fact, she caused and precipitated this condition to be started when she herself opened this unmarked door in order to proceed to the balcony. And therefore, based upon that, I think that this is not an illusion of space case.

The other case in which an illusion of space, a recovery had been permitted, was the case of Gabriel v. Hambro Company, 261 New York Suppl. 2d 998. In that case it was a case where the man had been away from the building for a number of weeks and when he had left the building—this was a public way, incidentally—when he had left the building there had been a red tape across the glass door. But when he returned a few weeks later there was no tape across the glass door and based upon that, the Court held, that the warning that should have been provided to him was not there and that the building in that case had created a situation in which a condition had changed.

(377) Those are the only two cases that I can find in which an illusion of space has been, recovery has been permitted on the theory of illusion of space. On each case the appearance has been changed not by the owner or tenant themselves; in this case the condition created in this situation was one that Miss Kalschuer in effect set into operation herself and she knew within five minutes before the accident occurred that there were no markings on this door and that there are doors subject to opening and closing.

And I further say, your Honor, that there has been testimony that this was a hot night and that

the apartment was air conditioned, and based upon those circumstances she should have reasonably expected that a patio door would be closed to preserve the coolness of an air conditioned apartment.

The Court: We will look at your cases and I will reserve decision.

Mr. O'Donnell: Yes, sir. I have a couple more.

Mr. Levy: Can I respond to that?

The Court: All right.

Mr. Levy: Your Honor, something of note in that Cooper case, which was a glass door case. The case really revolved around the fact that the plaintiff was found guilty of contributory negligence as a matter of law because in that case the glass door had a bar going right across it and they (378) ruled contributory negligence as a matter of law.

The illusion of space case that is really the most recent is Mattey v. Grays Drug Store, that was in 1973, and that case if 40 Appellate Division 270. That case bears a remarkable resemblance to this case. In that case, a door was similar to the door here, completely bare of any markings, no bar across it. In that case the plaintiff walked through it when it was open, made a phone call, and about five or ten minutes later walked back. Somebody closed the door. The plaintiff walked into the door, and the Court held that it was up to the jury to decide whether that person was fooled by an illusion of space. I think that case is directly in point with respect to glass cases.

Mr. O'Donnell: Your Honor, that case involved a commercial establishment.

The Court: Is this another motion you are going to make now?

Mr. O'Donnell: Yes, sir. Again the defendant moves to dismiss on the ground that there's been no testimony in this case that the patio door constituted a trap, and that the plaintiff's own testimony and the testimony of her sister, which I will go to first, the sister's testimony was that when the plaintiff first came to the apartment, she was shown around the apartment, was shown the patio door, was shown how to open (379) the door and was shown how to close the door and was aware at that time that there were no markings on the door. She testified also that during the two years or so prior to the accident, from the time her sister married Mr. Rounick and entered the apartment, she was in that apartment on a Thanksgiving holiday, sometime after the first of the year, her deposition said that she was in the apartment on various weekends, and she occupied this particular apartment for I believe a week to 10 days to two weeks prior to the time that the accident occurred; that she opened the door herself to enter onto the patio, was aware of the condition of the door, was aware that it was an unmarked sliding glass door and required no duty on behalf of defendant 215 East 68th Street to warn her of any condition as to the door. cause the condition was open and notorious for anybody to see it as they used that particular door, and I respectfully submit to your Honor that based upon that, the plaintiff, Miss Kalschuer, was contributorily negligent as a matter of law in that she did not see the glass door and that she was bound to see what by the proper use of her senses might have been seen.

It has been held in both the Cooper against Scharf case, I think we had before, and Wiegand v. United Tracks Company, 221 N. Y. 339, that the

failure to see which was bound by the proper use of her senses that she might have seen (380) was contributory negligence as a matter of law. And I respectfully submit that the plaintiff was contributorily negligent as a matter of law in this case, and the complaint as to 215 East 68th Street be dismissed.

The Court: I will reserve decision on that, but observe that the issue which the jury will decide is whether that glass door was such that she should have been able to see it by use of her senses.

Mr. O'Donnell: I respectfully except, sir.

The Court: All right. Is that all?

Mr. O'Donnell: Yes, sir.

The Court: You can bring the jury in. (The jury entered the courtroom.)

The Court: Again I have to apologize to the jury for the length of time we took on some legal arguments here. I hope you will excuse us again.

Mr. O'Donnell, are you going to put on any witnesses on behalf of the defendant 215 East 68th Street?

Mr. O'Donnell: Yes, sir, I am.

The Court: All right. Call your first witness, please.

Mr. O'Donnell: Before I do that, your Honor, I'd like to read from a portion of Mr. Rounick's testimony at the deposition before trial taken on January 23, 1973.

(381) Mr. Krimsky: I object to that, your Honor.

The Court: This is the deposition of an adverse party. There is a cross claim here by the Rounicks against 215 East 68th Street, and the rules say that the deposition of an adverse party can be used for any purpose. There is the case of Pfotzer v. Aqua Systems to the same effect.

Mr. Krimsky: Except in this case the jury is not deciding the cross claim as between the two of them.

The Court: Well, I think the jury is going to decide that because I am going to leave that to the jury.

Mr. O'Donnell: Your Honor, I wonder which attorney is trying this case. We seem to be getting battering from two sides here.

The Court: I treat this as an objection.

Is that right, Mr. Levy?

Mr. Levy: Yes. I think, further to Mr. Krimsky's objection to the use of the deposition, it is my understanding of the law that to use the deposition you must first lay a foundation that the defendant is unavailable for trial.

The Court: That is where you make your mistake. The rules say that the deposition of an adverse party can be used for any purpose, even if he is right here in the courtroom.

All right, go ahead, Mr. O'Donnell.

(382) Mr. O'Donnell: Thank you, your Honor.

The attorney for the plaintiff in this case was
Isaac Blacker representing the plaintiffs; Thomas
E. Patterson representing 215 East 68th Street,
and the attorney representing Mr. Coughlin's office was James I. McGuire.

The deposition before trial at the point I am about to read was conducted by Mr. Blacker, and I refer you gentlemen to page 3. As I said, this is the deposition of MR. ROUNICK taken by Mr. Blacker, an attorney associated with the plaintiffs herein.

Page 3, line 19:

"Q. What is your name? A. Jack Rounick.

"Q. Where do you reside? A. 1111 Biscayne Boulevard, Miami, Florida.

"Q. Mr. Rounick are you the defendant in this case? A. Right.

"Q. Were you the leesee of an apartment located at"—and they have the address 210 East 68th Street—"in July of 1968?"

I presume they meant 215.

Mr. Conway: I think I object to that, your Honor. I think the lease is the best evidence on this.

The Court: Read the question.

(383) Mr. O'Donnell:

"Q. Were you the lessee of an apartment located at 210 East 68th Street in June of 1968."

Mr. Conway: That has nothing to do with this matter.

The Court: I think he can identify himself as being the person who is known as the lessee without placing any magical legal significance.

Mr. Conway: They are referring to a building 210 East 68th Street, your Honor.

Mr. O'Donnell: This appeared to be an error in the transcribed testimony, your Honor.

The Court: There is no dispute about the premises we are talking about, is there, Mr. Conway? Mr. Conway: Unless he had another one there.

I don't know.

The Court: He was the lessee of the apartment at 215 East 68th Street.

Mr. Conway: He was indeed.

The Court: Then let's not quibble about things that are not important.

Mr. O'Donnell: It is a typo, your Honor.

"A. Yes.

"Q. How long prior to that time had you been the lessee of that apartment? A. Approximately five years. (384) "Q. Were you the lessee individually or was there a co-lessee with you? A. Only me.

"Q. Mr. Rounick, when you moved into the apartment was it a new apartment or was it a newly constructed building? A. Newly constructed building and new apart-

ment.

"Q. Therefore, is it correct to say you leased this directly from the landlord? A. Correct."

I refer you to page 5, your Honor, line 16:

"Q. Had there ever been a time prior to July of 1968 that those panes broke, were shattered, or were replaced in any way? A. No.

"Q. So far as you know, therefore, the panes in those sliding glass doors were the original panes as installed when you entered into possession of the apartment? A.

Yes.

"Q. Was there ever a time that you requested the landlord of the apartment or the defendant 215 East 68th Street to put any markings or any notations on the glass doors? A. No."

> That completes my portion of the deposition. Mr. Conway: Your Honor, at page 12, line 19, there (385) is a question:

"Q. Did there ever come a time at nighttime with the conditions being that there were lights inside the apartment and it was dark outside the apartment that you had

bumped into the plate glass door? A. I was never out there at night."

Mr. O'Donnell: Your Honor, at this time I'd like to place in evidence on behalf of the defendant 215 East—

Mr. Krimsky: If your Honor please,-

The Court: Is there some part of that deposition you want to read, Mr. Krimsky?

Mr. Krimsky: Yes, your Honor.

The Court: Proceed.

Mr. Krimsky: On the same page, page 12, line 25:

"Q. Did there ever come a time that you bumped into the door on the way out to the patio?"

Mr. O'Donnell: Objection. Not the same set of circumstances as existed when the plaintiff was going onto the patio.

The Court: Overruled.

Mr. O'Donnell: I respectfully except.

Mr. Krimsky:

"A. When?"

"Q. At any time during the five years that you lived there."

(386) Mr. O'Donnell: Objection. There is no showing that the circumstances were the same.

The Court: Overruled.

Mr. Krimsky:

"A. Yes.

"Q. All right. Were there any markings on the door to indicate that it was a plate glass as opposed to open space?"

Mr. Conway: Objection. The Court: Overruled.

Mr. Krimsky:

[&]quot;A. No."

That's all I have, your Honor, as to the deposition.

The Court: Go ahead, Mr. O'Donnell.

Mr. O'Donnell: Thank you, your Honor.

At this time I'd like to place in evidence the local climatological data charts from the U. S. Department of Commerce for the months of June 1968 and July 1968 to show the rain and weather conditions which existed from the time that the plaintiff occupied the apartment up until the time that the accident occurred.

I note, your Honor, that these copies are certified by the Department of Commerce.

Mr. Krimsky: No objection.

Mr. Conway: I have no objection. The Court: They may be received.

(Defendant 215 East 68th Street, Inc. Exhibit 2 (387) received in evidence.)

Mr. O'Donnell: Your Honor, I'd like to read a portion of that into evidence so that the jury may hear it. That on June 27, 1968—

The Court: What is the relevance of June 27, 1968?

Mr. O'Donnell: Your Honor, I am trying to show that—in fact, for all of June, 1968, Mrs. Rounick testified that she left the apartment at the end of May, 1968, and took her maid with her to East Hampton. The maid was the one whose duty it was under Mrs. Rounick's supervision to wash and polish the windows and glass doors of the apartment. So therefore, if there was any rain during the months of June and July prior to the time that the plaintiff was injured, those doors would show rain spots, dust spots, and the usual dirt and smog that the City of New York is subject to during the summer months.

The Court: Proceed.

Mr. O'Donnell: I think I should start with the first day of June since Mrs. Rounick left.

The Court: Why don't you just talk about the

days of rain?

Mr. O'Donnell: All right. This shows there was traces of rain on June 2 up until 10:00 a.m., the exact times can be noted from the chart itself; that there was .03 inches (388) of rain at eleven o'clock. There was rain, .02 inches of rain at twelve o'clock—

Mr. Krimsky: When you say .02, .03, that means two hundredths of an inch?

Mr. O'Donnell: I don't know what it means.

The Court: The Court will take judicial notice that .03 is three-hundredths of an inch.

Mr. O'Donnell: At two o'clock there was rain at 2:00 p.m. on June 3rd at .04 inches. At three o'clock there was a little over two-tenths of an inch, .24 inches, and at 4:00 p.m. there was three one hundredths of an inch on June 3.

On June 11 there were traces. On June 12, 1968 there were traces at 7:00 a.m., 8:00 a.m. Two one-hundredths of an inch at 9:00 a.m. Nine one-hundredths of an inch at 10:00 a.m.; .57 inches at 1:00 a.m., and 0.5 at 12:00 a.m., and that the rest of the day continued, and I ask in the interest of saving time of the Court and jury, rather than go through all the days including the rain, just to say that there was rain on the 12th, 13th, the 18th, the 20th, the 24th, the 26th, 27th, 28th, and 29th. There was also rain on July 3 and July 4, and there was a trace of rain on July 10 at 9:00 a.m.

I would ask the jury to examine this exhibit on behalf of Defendant 215 East 68th Street.

(389) While the jury is doing that, your Honor, I have a photocopy of the weather data and phases of

the moon from the New York Times for July, showing the phases of the moon on July 10—

Mr. Krims'.y: Excuse me, your Honor.

Mr. O'Donnell: May we approach the side bar? The Court: All right.

(At the side bar.)

Mr. O'Donnell: Your Honor, I have a photocopy, we don't get the exact page of the New York Times, dated July 10, 1968 showing what the moon was and it indicates that the moon was full on July 10, 1968.

Mr. Krimsky: Does that indicate whether there was clouds below the moon?

The Court: I think he is offering it to show that there was a full moon on July 10.

Mr. Krimsky: Is that a governmental document? The Court: It is a newspaper almanac, which is an exception to the hearsay rule.

Mr. O'Donnell: A reputable newspaper in New York.

Mr. Krimsky: For the record, I object.

The Court: Your objection is noted.

(In open court.)

Mr. O'Donnell: Your Honor, at this time I ask the (390) Court to take judicial notice that on July 10, 1968, according to the New York Times, the moon on the night of July 10 was a full moon.

The Court: What you are doing is simply offering that exhibit and I am admitting it over the objection that has been made and you can call the contents to the attention of the jury.

Mr. Krimsky: The reason for my objection, your Honor, is that it is not relevant in the sense that we don't know if there is cloud covering.

The Court: That is a matter for your argument. I think that goes to the weight to which the document is entitled, not to its admissibility.

(Defendant 215 East 68th Street Inc. Exhibit 3 received in evidence.)

(Pause.)

Mr. O'Donnell: Your Honor, at this time I also ask that the jury—that I pass this weather report for July back to the jurors, showing that the temperature at 10:00 p.m. on July 10, 1968 was 72 degrees.

(Pause.)

Mr. O'Donnell: The defendant at this time calls Mr. Luber.

HERBERT LUBER, called as a witness by the (391) Defendant 215 East 68th Street, Inc., was duly sworn and testified as follows:

Mr. Krimsky: May we see your Honor at the side bar, please.

The Court: All right.

(At the side bar.)

Mr. O'Donnell: Mr. Luber is the manager of the building. He should be there.

Mr. Krimsky: Mr. Luber is not listed.

Mr. O'Donnell: At this time I move to amend my pretrial contentions to permit us to examine as a witness on behalf of the defendant the manager of the building, to identify items not with respect to the fact situation, but as a rebuttal witness.

Mr. Krimsky: If your Honor please, he never

listed that in his pretrial order.

Mr. O'Donnell: I reserved the right to recall additional witnesses between now and the time of trial, as did the pretrial memoranda, as required by the rules of this court. The Court has been

very lenient in all occasions in permitting additional witnesses to be called if there is a showing of their need.

I want Mr. Luber to identify the lease and also some business records kept in the course of business of (392) 215 East 68th Street with respect to the notice that was alleged by Mrs. Rounick. I submit that failure to do so will be prejudicial to the defense of the case.

The Court: I've got to weigh that against the prejudice to the plaintiffs in not naming this witness and giving him any advance notice. That is the purpose of the pretrial order and the provision you just read says that there will be further notice if you intend to call in further witnesses.

Mr. O'Donnell: I am giving my notice at this time, your Honor.

The Court: I know you are. What was there in the plaintiff's case that surprised you that you have to call this witness without giving notice before?

Mr. O'Donnell: She testified that there was an employee by the name of Archie to whom she said she requested decals to be put on the door. We have requested of the building or the defendant that the name of the man named Archie who was employed by them during the period of time from the time the building opened until the time that the accident occurred and thereafter.

The testimony of Mr. Luber will be that there was only one Archie employed and that based upon their business records, Archie Tessyman started as a handyman on May 5, (392A) 1969; that is a year after the accident. Based upon that, his testimony is essential to the defense.

The Court: I will permit it under these circumstances. This came up in the plaintiff's case. He

couldn't have foreseen that the plaintiff was going to refer to Archie.

(In open court.)

Direct Examination by Mr. O'Donnell:

- Q. Mr. Luber, by whom are you employed? A. Rudin Management.
- Q. Do they manage a building located and known as 215 East 68th Street, Inc.? A. Yes.
- Q. How long have you been managing this building, sir? A. Since 1962.
 - Q. What is your title? A. Building superintendent.
- Q. During that period of time, sir, between 1962 and July 10, 1968 when an alleged accident occurred, were you the building superintendent of that building? A. Yes.
- Q. During this period of time, I refer you to the period of time before an accident occurred, did you have a man named Archie in your employ prior to that time? (393) A. No.
- Q. Subsequent to that time, sir, did you have a man named Archie employed by the building? A. Archie Tessyman.
- Q. Can you tell me, sir, of your own knowledge when Mr. Tessyman started and what his job was? A. He started May, 1969, as a handyman.
- Q. I show you these documents and I ask you if you can identify them. A. Yes. These are my records, file records.
- Q. Are they records kept in the regular course of business of Defendant 215 East 68th Street, Inc., and Rudin Management Company? A. Yes.
 - Q. Can you tell us what these records are, sir?

Mr. Krimsky: May I see them?

The Court: Yes. Why don't you have them identified?

(Defendant 215 East 68th Street Exhibit 4 marked for identification.)

Q. Mr. Luber, I ask you if this is a record kept in the regular course of business and was it the regular course of business to keep such records on behalf of Defendant 215 East 68th Street, and Rudin Management. A. Yes.

(394) Mr. O'Donnell: I offer it in evidence.

The Court: Any objection?

Mr. Krimsky: No objection, sir.

Mr. Conway: None.

The Court: It may be received.

(Defendant 215 East 68th Street Exhibit 4 received in evidence.)

Q. Mr. Luber, I ask you what this card attached to and as part of the exhibit is, and will you tell us who was it made out by, and whose handwriting that is. A. At hiring with this application, based on this I take note of personal things which I, during the process of the years in connection with payroll, et cetera, have to look at. So I keep a separate file with these cards, and indicate when the man, after probation time is being made permanent, or anything after he has been promoted or in fact deceased.

Q. When did Mr. Archie Tessyman become associated with the building, sir? A. He started May 17, 1969.

Q. Did he make out an application for employment? A. Yes. Based on the application which I had signed here as accepted, qualified.

Q. That is the large piece of paper which has been marked as Defendant's Exhibit 4; is that correct, sir? (395) A. Yes.

Q. Is Mr. Tessyman still employed by 215 East 68th Street, Inc.? A. No.

Q. Can you tell us why not, sir? A. He is deceased.

Q. Can you tell us when he passed away? A. I would have to see this, because I do not know exactly the date. He died May 30, 1972.

Q. Is he the only Archie that was associated with the building since its opening? A. Yes, sir.

Mr. O'Donnell: May I show this to the jury, your Honor, since it has been marked in evidence?

The Court: You may.

(Pause.)

Mr. O'Donnell: Your Honor, may we approach the side bar?

The Court: Yes. (At the side bar.)

Mr. O'Donnell: As far as the cross-complaints are concerned in this case, are you going to reserve decision on them, your Honor, or are they—

(396) The Court: I am going to let the jury decide whether each defendant is negligent and if it decides that both are negligent, the portion of relative responsibility between them.

Mr. O'Donnell: There are additional cross-complaints in this case based upon the lease and pro-

visions of the lease.

The Court: I will reserve decision on that. Assuming they find, for example, that only one of the defendants are liable, I will decide whether or not there is any liability of the building over to the defendants.

Mr. O'Donnell: Then I will just introduce the lease and let it go at that.

Mr. Conway: I think I may introduce it for all purposes.

Mr. O'Donnell: I think I will, too.

(In open court.)

Q. Mr. Luber, I show you this document and I ask you to look at it and look at the signatures on it. Can you identify it for us? A. It is a regular lease signed by Mr. Samuel Rudin as the owner and Jack Rounick as the tenant.

Q. Is that a document kept in the regular course of business by 215 East 68th Street and is it the regular course of business of 215 East 68th Street, Inc. to keep leases in (397) the regular course of business? A. Yes.

Mr. O'Donnell: May I offer it for identification, and then in evidence, since counsel have already seen it?

The Court: Any objection? Mr. Conway: I have none.

Mr. Krimsky: I have no objection.

(Defendant 215 East 68th Street Exhibit 5 received in evidence.)

Mr. O'Donnell: That's all I have. Thank you.

Mr. Conway: I have no questions.
The Court: Any cross examination?

Cross Examination by Mr. Krimsky:

Q. Mr. Luber, the building had a maintenance department? A. Yes.

Q. You said you were the manager of the building? A. Yes.

Q. So that the building maintenance department was under your dire ion? A. Yes.

Q. Was it customary that if somebody had some repairs needed to be made in the building, that they would pick up the phone, the house phone or so, and call the maintenance (398) department? A. Yes.

Q. And the maintenance department would send someone up to make repairs, the necessary repairs; is that correct, sir? A. Yes.

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Herbert Luber, for Defendant 215 E. 68th St., Cross

Q. Didn't the building also have a key, the maintenance department or whoever, somebody in authority there had a key to every one of these apartments? Is there a master key? A. A master key only partially opens an apartment.

Q. You did have a master key? A. Yes.

Q. For example, if there was a leaking faucet somewhere and nobody was in that apartment, and it was running down into the apartment below, and the person down below saw the running water coming down, they would call the maintenance department and the maintenance department would have the right then to go into that apartment above, would they do that?

Mr. O'Donnell: Objection.

The Court: When you refer to "right," you are getting a legal conclusion into it.

Q. The man then would presumably go into the apartment above?

Mr. O'Donnell: Objection.

- (399) The Court: Yes. I don't like the word "presumably." You said the man would presumably go into the apartment above.
- Q. If there was a problem in an apartment and the tenants of that particular apartment were not at home, were not in their apartment, and the building knew that that problem existed, that you or the maintenance staff knew that that problem existed and it was an emergency type of problem such as the overflowing of a toilet or a bath tub or something like that, would then the building use their key, the maintenance or you or whoever in the building, use the key and enter that apartment?

Mr. O'Donnell: Objection.

The Court: Again you phrase it in terms of a specific unidentified situation. Why don't you ask him what the custom was with respect to the maintenance department entering apartments in the building to repair conditions that arise.

Q. If a tenant is not at home, what is the custom of the building management, maintenance, et cetera, if there is an emergency situation with regard to something taking place in that apartment when the tenant is not at home?

Mr. O'Donnell: Objection.
The Court: He may answer.

A. Only if there is a known emergency reported that it is advisable, that there is fire, water, flood or similar (400) extreme emergency, then we have the right or seek the right to enter, after first consulting or trying to consult relatives or customarily tenants leave their office, their addresses of offices whom we can contact in an emergency and obtain permission to enter.

Q. If you can't get in touch with the tenant or his relatives or anything like that and there is an emergency? A. If it was an extreme emergency, we have to enter the apartment to protect the rest of the tenancy.

Q. How do they enter the apartment? A. Through the front door.

Q. By what means, sir? A. With the key, or eventually with a drill.

Q. You use a key and if there is another lock which has the door locked, then you use a drill? A. Yes.

Mr. Krimsky: May I have a moment, your Honor?
(Pause.)

Q. Is it not, sir, a rule of the apartment building that the tenant must furnish you or the building or maintenance

with the key to any other lock that they install? A. In the interests of meeting emergencies, yes.

Q. They do furnish you with the other key? A. They

do voluntarily furnish, but it is not all.

(401) Q. That is not what I asked you, sir. Isn't it a rule of the building that the tenants—a rule that the tenants actually give you the key? A. Not to my knowledge.

Q. Counsel introduced that lease that you have identified. Are you aware, sir, that it says at Paragraph 11 under "Rules and Regulations," that the landlord may retain a passkey to the premises, that no tenant shall alter any lock or install a new lock or locks on any door of the demised premises without the written consent of the landlord or the landlord's agent. In such cases consent is given, the tenant shall provide the landlord with an additional key for the use of the landlord pursuant to the landlord's right of access to the demised premises.

Mr. O'Donnell: Objection. The lease speaks for itself.

The Court: The question is whether he is aware of it. He may answer yes or no.

A. Yes.

Q. I beg your pardon, sir? A. Yes.

Q. Are you aware, sir, or is there a rule, sir, that you are aware of, that no decorations or placards or anything be placed on windows on any part seen outside—that could be (402) seen from outside the demised premises without the written consent of the owner of the building, the landlord?

Mr. Conway: I object to that. Mr. O'Donnell: Objected to.

The Court: I really don't understand the relevance of the question as to whether or not the

witness is aware of that. The document speaks for itself and it is already in evidence, and if there is such a provision you can read it to the jury. It isn't necessary to ask this witness whether he is aware of it. I permitted the question because he's already said he wasn't aware of the rule, so it was a continuation of that line of examination. But now you are on a different subject here, and I think the lease speaks for itself.

Q. Sir, in the course of your occupation, your job, are you aware, sir, that the building keeps a logbook of repairs?

Mr. O'Donnell: I object to the form of the question unless it is specifically referrable to July 10, 1968.

The Court: I assume that you are inquiring as of July 10, 1968?

Q. In 1968. A. Calls are received on a yellow pad, evaluated, and then a working ticket will be issued to the man who performs the job. It is actually just a memo list to assist to write (403) out the regular ticket. So the memo list we don't keep, we destroy.

Q. Which list? A. The yellow pad while we are receiving a call, the house call man receives a call and jots it down. Then he evaluates whatever kind of job it is and makes out a working ticket for the man. The regular ticket itself on the yellow pad, we don't keep them. We destroy them as they are used up.

Q. What about the repairs? A. The repairs will be performed.

Q. The repairs are logged? A. On the tickets.

Q. And then you throw away the ticket? A. Usually I hold them for more than a year, then I throw them away.

Q. Is there an indication on the ticket how many hours the job— A. No.

Mr. Krimsky: Nothing further.

Mr. Conway: Nothing further.

Mr. O'Donnell: No, sir.

Mr. Conway: Wait a minute. There is one question.

Cross Examination by Mr. Conway:

(404) Q. Mr. Luber, I show you this photograph and ask you if this is a fair representation of the way the dining room and chandelier in Apartment 20-S looked in June of 1968.

Mr. Krimsky: May I see that before you show it to the witness, sir.

The Court: You may.

(Document handed to Mr. Krimsky.)

Mr. Krimsky: What was the question again, sir?

Mr. Conway: Repeat the question.

(Question read.)

A. I have not been in this apartment at that time.

Mr. Conway: May I have this marked for identification, your Honor.

(Defendants Rounick Exhibit D marked for identification.)

- Q. Have you had occasion to be in there in and around the summer of 1968? A. Not that I recall.
- Q. Did you ever see the chandelier that is shown in that picture? A. Yes.
- Q. Do you remember when you first saw it? A. I think 1967 or somewhere when I had to check the apartment for an alteration. It was in connection with the lease.

(405) Q. Did you see it at some later period after 1967? A. I didn't draw my attention to the decoration. Just the room is such as it was always.

Q. How about the chandelier? A. I don't know about the chandelier if it is the same or whatever, I have no recollection of the decoration.

Q. But you did see it in 1967? A. Yes.

Mr. Conway: I offer it in evidence, then.

Mr. Krimsky: I object, your Honor.

Mr. O'Donnell: I have no objection.

The Court: Let me see it.

Mr. Krimsky: Your Honor, he said he doesn't know if that is the same chandelier in 1967.

Mr. Conway: I thought the witness said it was the way it looked in 1967.

The Court: In 1967, that's the rub, Mr. Conway. We are talking about 1968, and I think unless it is tied to 1968, it is not admissible.

Mr. Conway: Mrs. Rounick did say that sometime after 1968 she did change the decor in the dining room and the chandelier, but it was after '68, after the accident.

The Court: I've got to exclude it now unless it in some way is tied to the accident by way of date.

(406) Mr. Krimsky: Excuse me. Did this witness say that that is the way it looked in 1967?

The Court: The record will speak for itself. I'm not going to try to restate it. You can have it reread if you want to.

Re-direct Examination by Mr. O'Donnell:

Q. Mr. Luber, to your knowledge, does this photograph fairly and accurately represent the condition of the chandelier, dining room and windows between the period of July 1966 and July 10, 1968? A. Yes.

Mr. O'Donnell: I will offer it in evidence. The Court: Do you want to examine him about that, Mr. Krimsky? Mr. Krimsky: Yes.

Voir Dire Examination by Mr. Krimsky:

Q. Mr. Luber, would you kindly look at that photograph.

Is it your testimony, sir, that you recollect that that chandelier is the same chandelier and that room appears as the same room in 1967? A. I do not recollect.

Q. You were just asked a question— (407) A. The entire picture I recollect, but I can-if the phone was here in the middle as it shows, I would not know that.

Q. Excluding the phone, sir, we are talking about the chandelier, the walls, et cetera. A. I can recollect that it looked like that as a whole.

Q. What do you mean, as a whole? A. As this picture shows.

Q. Then the wallpaper looked like that; is that correct? A. Yes.

Q. And there were no drapes; is that correct? A. No.

Q. What, sir? A. There were no drapes.

Q. And that chandelier-

Mr. O'Donnell: There were no drapes when the picture was taken. Please finish your question. I will object to the question unless it is within a frame of reference, a time period. Obviously there were no drapes when that picture was taken.

The Court: Your question concerned the entire period from 1966 to June 1968. So I assume that Mr. Krimsky's question refers to the same period.

Let me ask you this-

Mr. Krimsky: Excuse me, sir.

(408) Q. When was that picture taken, sir? Can you read that?

The Court: How would he know when the picture was taken?

Mr. Krimsky: There is a date on there.

The Court: He didn't put that date on there. Anybody could have put that date on there. Your question is improper, sir. I'm not going to let the photograph in anyway unless I find out that it reflects the condition as of 1968 and that is what I'm trying to get 6t.

Mr. Luber, were you in the apartment at any time from 1966 until July 1968 other than the one time you referred to in 1967?

The Witness: Once.

The Court: Only once in 1967?

The Witness: Only once during that time, yes.

The Court: That's what I thought. I'm going to exclude the photograph unless it is tied down to July 1968.

Mr. Conway: Are you finished?

Mr. Krimsky: I'm not quite finished, but it is excluded anyway.

By Mr. Conway:

Q. When any tenant wants to change a fixture in their apartment—

Mr. Krimsky: Excuse me for one second, your Honor.

(409) May I ask counsel, since he supplied that photograph, when that photograph was taken?

Mr. Conway: There is a date on it.

Mr. Krimsky: Can you read the date for us?

Mr. Conway: When was it, April '69?

The Witness: 4/25/69. Mr. Krimsky: '69?

The Witness: Yes, sir.

Mr. Krimsky: Go on, sir.

By Mr. Conway:

Q. Whenever anybody, any tenant, wants to change a chandelier in the apartment, do they check with your department first? A. Not necessarily.

Mr. Conway: Thank you.

The Court: Anything further for Mr. Luber?

Mr. O'Donnell: No, your Honor.

The Court: Do you have anything further, Mr. Krimsky?

Mr. Krimsky: Excuse me for one second, your Honor. (Pause.)

Mr. Krimsky: Nothing further, your Honor.

The Court: Thank you, Mr. Luber.

(Witness excused.)

(410) The Court: Mr. O'Donnell, do you have any further witnesses?

Mr. O'Donnell: No further witnesses, your Honor. I'd like just to read a portion of the lease, if I may.

The Court: All right.

Mr. O'Donnell: If I may have a moment, your Honor. (Pause.)

Mr. O'Donnell: Under Paragraph 5 of the lease. The paragraph is subheaded "Repairs." Number 5:

"Tenants shall take good care of the demised premises and fixtures herein and subject to provisions of Article 4, which concerns alterations."

Maybe I'd better read Article 4, too, just for the sake of continuity.

Colloquy

Section II, Occupancy:

"The demised premises and any part thereof shall be occupied only by tenant and members of the immediate family of tenant, and as a principally private dwelling apartment and for no other purpose.

"Paragraph 4. Alterations:

"Tenant shall make no alterations, decorations, additions or improvements in or to demised premises without landlord's prior written consent, and then only by contractors or mechanics approved by landlord. All such work shall be (411) done at such times and in such manner as landlord may from time to time designate. All alterations, additions or improvements upon the demised premises made by either party, including all paneling. decorations, partitions, railings, mezzanine floors, galleries and the like, shall, unless the landlord shall elect otherwise, be made by giving a notice pursuant to the provisions of Article 25 not less than three days prior to the expiration or other termination of this lease, or any renewals or extensions thereof, become the property of the landlord and shall remain upon and be surrendered with said premises.

"Repairs. Tenant shall take good care of demised premises and fixtures therein and subject to the provision of Article 4 herein, shall make as and when needed as a result of misuse or negligence by tenant, all repairs in and about demised premises necessary to preserve them in good order and condition, which repairs shall be in quality and class equal to the original work. However, landered may repair at the expense of tenant all damages or injury to demised premises or the building of which the same form a part, or as to its fixtures, appurtenances or equipment done by tenant or tenants servants, employees, agents, visitors or licensees, or caused by moving property of tenant in and/or out of the building, or by the installation or removal of furniture or (412) other property or result-

ing from air conditioning unit system, short circuits, overflow or leakage of water, steam, illumination, gas systems or"—

Mr. Conway: I wonder how relevant all of this section is, sir.

The Court: I wonder myself, but I don't like to-

Mr. O'Donnell: It is in evidence.

The Court: The fact that it is in evidence doesn't mean that the entirety has to be read to the jury. It is up to you. If there is anything important there, feel free to read it. The fact that it is in evidence doesn't compel you to read it all.

Mr. O'Donnell: I will take your advice, sir.

That's all I have, your Honor.

The Court: Do you have anything further?

Mr. O'Donnell: The defendant rests.

The Court: Any rebuttal, Mr. Krimsky?

Mr. Krimsky: No, your Honor.

The Court: We will take our afternoon break now, ten minutes, and we will come back and counsel will make their summations.

(The jury left the courtroom.)

(Recess.)

(In open court; jury not present.)

(413) The Court: Any motions before summations?

Mr. O'Donnell: Yes, your Honor.

On behalf of the defendant 215 East 68th Street, Inc., at this time, your Honor, I move to dismiss all the causes of action against Defendant 215 East 68th Street on the ground that there was no negligence shown on behalf of the defendant; that there was no notice shown to that defend-

ant of any condition prior to the time that the accident occurred that there was either a defective condition of that door or that the door was improperly maintained or designed or that there was a difficulty concerning people bumping into it or a difficulty concerning that door at all.

The testimony of Mrs. Rounick was that she notified a man named Archie. The man named Archie, according to the records of the building, is now dead, and he was not employed there prior to the time that the accident occurred. His employment started in May of 1969.

Therefore I submit to the Court that in order for plaintiff to be successful or to prove a prima facie case against Defendant 215 East 68th Street, it must show notice of a condition which would subject that owner to liability, and no notice has been shown.

I therefore submit that as to Defendant 215 East 68th Street the plaintiff failed to prove a prima facie case. (414) The Court: I am going to deny the motion and explain that as I understand it this is a condition which preceded the lease. If there is a dangerous condition, and that is for the jury to determine, it is a condition that preceded the lease and is not in my opinion the kind of condition which the tenant would necessarily have to call to the attention of the landlord.

Mr. O'Donnell: I respectfully except, your Honor, and may I be heard further on that point.

With respect to the condition that the plaintiff is complaining of, the condition that she is complaining of is a failure because of the lighting and glass conditions, is a failure on her part to perceive glass. I submit to your Honor that when a building is constructed and the glass is put in, the building owner not in possession would have no way of knowing that there was a problem concerning visibility on that glass unless that problem is brought to the attention of the building owner.

The only testimony in this case by Mrs. Rounick was that she brought it to the attention of a man who began

his employment for the building some one year after the accident occurred. And therefore I submit that the specific condition for which the plaintiff is complaining and the specific condition for which Mr. Krimsky opened in his opening to the jury, was an illusion of space. That particular condition was (415) never brought to the attention of the building by any adequate notice which would require a change or which would submit it to liability.

The Court: My decision stands.

Mr. O'Donnell: I respectfully except, your Honor.

May I have a moment?

The Court: Yes.

(Pause.)

Mr. O'Donnell: I respectfully submit, your Honor, that on behalf of Defendant 215 East 68th Street, the plaintiff Renee Kalschuer has failed to prove a prima facie case of negligence against that defendant for the same reasons that I submitted to the Court at the end of the plaintiff's case, and if I may just summarize them briefly—

The Court: You don't need to repeat them. I have them very much in mind and my law clerk is up there now looking at the cases you have cited, and I have reserved decision on that. And before the jury is back with a verdict, if I decide that your position is well taken, I will grant the motion, and so instruct the jury.

Mr. O'Donnell: I submit all of those motions to your consideration.

The Court: All right. They may be considered as repeated now.

(416) Mr. O'Donnell: Thank you.

Mr. Conway: Your Honor, I have an additional motion. I move to dismiss on the ground that under the lease here the tenant had no right to make any alterations, decorations, additions or improvements without

the landlord's prior written consent. So that we could not under the lease be permitted to make any changes in this window.

The Court: Are you saying that the tenant could not have put a decal on that window, whether or not that decal would have been visible from the ground up to the 20th floor?

Mr. Conway: I don't know. It says here no decorations or additions.

The Court: If you said no, I think you have admitted that you don't know whether your motion has proper ground.

Mr. Conway: I think it would come under the definition of a decoration or improvement, which we are prohibited from doing.

The Court: You admit it would be an improvement?

Mr. Conway: It could come under one of those. It certainly would be an alteration or decoration.

The Court: I will reserve decision. I haven't read the lease. But if there is anything else in that lease that you want to call to my attention, I will listen to it.

Mr. Conway: Not at this point, I haven't anything (417) else.

Mr. O'Donnell: Only with respect to the cross complaint I ask that your Honor read the lease, that portion of it.

Mr. Conway: I have some other things on the cross complaint, too.

Mr. O'Donnell: That has been left to your determination.

With respect to the cross complaint, your Honor, may I at this time move with respect to the cross complaint to conform the pleadings to the proof, my cross complaint refers to Apartment 20-F, I believe, and all the testimony in this case has been to the effect that it was 20-S.

Mr. Conway: If that is the only thing involved, I will consent to that, of course.

Mr. O'Donnell: That is the only thing.

The Court: All right.

Mr. Krimsky: If your Honor please, I just make one note about the part that Mr. Conway mentioned. He said that no tenant shall make any alterations, et cetera, et cetera, without written consent. The tenant was on notice of this condition long before this accident, and therefore could have obtained written consent from the landlord but there is no evidence that she requested written consent.

(418) The Court: What is the basis of your statement that she could have obtained it? You mean she could have applied for it?

Mr. Krimsky: I mean applied for it. And the only other request I have, your Honor, is a personal one.

New York, March 21, 1974 10:15 a.m.

(Trial resumed)

(In open court; jury not present.)

The Court: Gentlemen, before you continue your summations, I will comment on your requests to charge and my disposition of them.

Mr. Conway: Your Honor, may I interrupt you for a moment? I particularly move to dismiss against Mrs. Rounick, who is not a lessee and actually had nothing to do with the lease here. I move to dismiss against her. That lease was in Mr. Rounick's name.

The Court: You are moving to dismiss as to whom?

Mr. Conway: Mrs. Rounick.

The Court: What is your ground as to dismissing her? Mr. Conway: Because the lease is only in Mr. Rounick's name, not hers. She was an occupant and still is an occupant of the apartment.

The Court: Can she be liable for negligence?

Mr. Conway: I don't think so. Not under the thrust of this case.

(423) The Court: What is your position on that?

Mr. Levy: Your Honor, the law is that it is not that a tenant or lessee is responsible, it is that the occupant or possessor is responsible, and that is where the liability or duty lies, on the occupant or possessor, regardless of titles given.

Mr. Conway: Which is Mr. Rounick, who is the lessee. Mr. Levy: No, it is Mr. and Mrs., because they were the occupants and possessors at and before the time of

the accident.

Mr. Krimsky: As a matter of fact, he admits to that. The Court: I will deny your motion.

Mr. Conway: Exception, sir.

Mr. O'Donnell: Your Honor, before you comment on the requests to charge, I have one supplemental request that I'd like to submit at this time, having to do with mitigation of damages. I must apologize for it not having a back, but it was done hastily last evening.

The Court: All right.

(Pause.)

The Court: I have commented previously in chambers informally on the requests to charge and now I will

supplement what I have previously said.

Mr. Levy: Excuse me, your Honor. I also have four (424) supplemental points for charge, all of which were included in our argument of yesterday. Excuse the crude nature, they are printed out and they have no back, but we have no secretary in New York City.

The Court: I will look at them.

(Pause.)

The Court: First with respect to plaintiff's requests to charge, I will not make charges 1 through 8. These all relate to the statute 30 McKinney, Section 241(b) which states that all transparent glass doors in public buildings shall be marked, et cetera. And to 30 McKinney

Section 2, which defines public buildings as including, among other things, apartment buildings.

In my opinion, the legislature did not intend to include in the definition of a public building an apartment in an apartment house which has been leased to and occupied by a tenant; and over which he has primary possession and control; and from which he has the right to exclude the public.

The substance of Requests 9 and 10 are included in the charge that I will give. And the substance of at least part of Request No. 11 is included in the charge that I will give.

Mr. O'Donnell: Your Honor, with respect to the charge requested in No. 11 of the plaintiff's requests to (425) charge, each of those cases cited refer to cases involving public areas in commercial establishments, and I submit that in my exception to your charging on that, No. 11, that there has been no testimony in this case that an illusion of space was indeed created and there is no testimony in this case that the owners of the building did anything to change the physical condition or nature of the door which is the subject of this suit. I respectfully except to your charge on that portion.

The Court: You haven't heard the charge yet. The part that I am going to include in the charge is the part that relates to it being a question for the jury to determine whether or not the conditions were such that a reasonable person exercising reasonable care might fail to see the closed glass door.

Mr. Conway: I take exception to that, your Honor.

Mr. O'Donnell: I do, too, sir.

Mr. Conway: I further point out that the only proof here of this condition was created by the plaintiff and her guests, not by my client.

The Court: With respect to plaintiff's handwritten supplemental points for charge which were handed to me just a moment ago, I see that the first three of these

charges relate to the statutory duty, so my treatment of them will be the same as the treatment to plaintiff's requests 1 through 9. I will (426) decline to make those charges.

I will also decline to make charge No. 4 because the condition that we are talking about here is a condition which at least to a substantial extent pre-existed at the time the premises were leased to the tenant. My charge, I think, will adequately take care of the obligation of the landlord.

Mr. Levy: Your Honor, with respect to your refusal to charge on plaintiff's supplemental point for charges 1 through 3, they relate to a different statute, the statute dealing with multiple dwelling laws and repairs. It does not refer to the violation of a statute dealing with glass doors. The 35A McKinney laws, Section 78, specifically refers to repairs by owners and landlords, and I think—well, plaintiff respectfully takes exception to your refusal to charge on those points. And also plaintiff excepts to your refusal to charge on No. 4 of plaintiff's supplemental points for charge as well as your refusal to charge on 1 through 8 of plaintiff's original points for charge.

Thank you.

The Court: With respect to the requests of Defendants Rounick, the substance of a major part, if not all, of Requests 1, 2 and 3 is included in the charge that I will give. I will not give charge No. 4 as requested except to the extent that it will be included in my charge as to the use of (427) ordinary care. I will not give the request to charge No. 5 except to the extent that it might be included in my general charge with respect to contributory negligence, which will refer to the standard of reasonable care for one's own safety.

With respect to requests of Defendant 215 East 68th Street, the substance of a major part, if not all, of requests 1 through 4 will be included in my charge. I will

not give request No. 5 except to the extent that it may be included in my general charge on contributory negligence, which will refer to the standard of reasonable care for one's own safety.

I will give the substance of charge No. 6 requested by 215 East 68th Street. I will give some and perhaps a major portion of the request to charge No. 7, rephrased in somewhat different language to instruct the jury that it is for them to determine the prospects that Miss Kalschuer had for income, taking into consideration the unpredictable nature of the modeling profession, those who try and fail, her relative qualifications and assets as compared to those who have succeeded and those who have failed. In that comment I have also included much of the substance of request to charge No. 8.

With respect to the supplemental request to charge of Defendant 215 East 68th Street, I will include a brief charge with respect to mitigation of damages by subjecting oneself to an operation of a plastic surgeon. (428) Mr. O'Donnell: Your Honor, at this time, may I respectfully except to your refusal to charge Defendant 215 East 68th Street's request to charge No. 5. I feel, sir, that it is the law of New York that a plaintiff is bound to see by the proper use of her senses, she might have seen, and the cases hold that her failure to do so is negligence as a matter of law. I respectfully except to that ruling, sir.

The Court: I think under the circumstances of the present case where we are talking about something which is difficult to see under certain conditions of lighting, then I think it is for the jury to decide whether or not a reasonably prudent person exercising reasonable care for her own safety under all the circumstances should have been able to see that which was difficult to see. And I think the use of language which would suggest to the jury that a person is always under a duty to see everything that might have been seen, is misleading in that

it does not give proper weight to the varying difficulty of seeing things under varying lighting conditions, particularly this like transparent glass panel door.

Mr. O'Donnell: I respectfully except, sir.

Mr. Conway: I respectfully except, and also except to your Honor's refusal to charge requests 4 and 5.

The Court: All right.

Will you call the jury in, please.

(483) Afternoon Session 2:00 p.m. (In open court; jury present.)

The Clerk: The Court is about to charge the jury. All those spectators wishing to leave the courtroom, please do so now.

Court's Charge.

The Court: Ladies and gentlemen of the jury, you are about to enter upon your final function as jurors, and that is to decide the facts of the case. You, of course, are the sole and exclusive judges of the facts. You alone pass on the weight of the evidence and the credibility of the witnesses, and you alone determine the reasonable inferences to be drawn from the evidence.

It is my duty to instruct you as to the law, and it is your duty to accept these instructions as to the law and to apply them to the facts as found by you in your deliberations.

In your determination of the facts, you rely solely upon your recollection of the evidence. What I may have said from time to time during the trial and what I say now in this charge, and whatever counsel may have said during the course of the trial or during their summations, is not to be taken by you in place of your own recollection

of the evidence. No comments by counsel or by the Court are evidence. You are to draw no inferences from them.

(484) During the course of the trial I have naturally been forced to pass upon objections as to the admissibility of evidence and upon motions made by counsel. You are to draw no inferences from the Court's rulings with respect to the admission or rejection of evidence or the motions made by counsel. Such rulings relate solely to matters of law and they are not to concern you as the triers of the facts. Neither are you to be concerned by the fact that the Court may have asked questions of the witnesses, nor the nature of the questions asked. These questions were asked solely to elicit or clarify facts at issue. Nothing that the Court said is to be construed to indicate what your determination should be, except of course that you must follow the instructions which I give you now as to the law.

You must ignore any answers by witnesses made either voluntarily or in response to a question where such answers have been stricken out. They form no part of the evidence and may not be considered by you in determin-

ing your verdict.

The evidence consists only of the testimony of witnesses on the stand, the portions of depositions or answers to interrogatories which were read into evidence, and the exhibits admitted into evidence.

You are to perform your duties with logic, and not (485) emotion. Both direct and cross examination should be considered by you. You may draw certain inferences from the testimony but you are not permitted to draw inferences from other inferences. No verdict should be based upon speculation or conjecture. You should consider both direct and circumstantial evidence.

Direct evidence is where a witness who saw a thing or an event testifies as to what he saw, heard, or felt. In

other words, what he knows of his own knowledge; something which came to him by virtue of his own senses.

Circumstantial evidence is evidence which tends to establish one fact which is at issue by proof of one or more other facts which have a logical tendency to lead the mind to the conclusion that the fact at issue exists. The law makes no distinction between the weight to be given to direct evidence and that to be given to circumstantial evidence.

In this as in every case we begin with the fundamental principle that the plaintiff or plaintiffs, having brought the suit, have the burden of proving the material allegations of the complaint by a fair preponderance of the credible evidence. The term "fair preponderance of the credible evidence" means the greater weight of the evidence. It refers to the quality of the evidence, rather than the number of witnesses. It means that the evidence in behalf of the party on who rests the burden of proof must have more (486) convincing weight than that of the opposing party.

You may say that a fact has been proven by a fair preponderance of credible evidence when, after considering all of the credible evidence relating to that fact, you are persuaded to believe that the existence of the fact. If you believe that the credible evidence relating to a particular fact is evenly divided between evidence tending to prove the fact and evidence tending to disprove it. then you must conclude as to that particular fact against the party who has the burden of proof with respect to that fact. As I have said, the burden is on the plaintiff as to the necessary elements of the plaintiff's case. The defendants are not required to introduce any evidence at all. The plaintiff, even if the defendant does not introduce evidence, is nonetheless required to establish by a fair preponderance of the credible evidence each of the necessarv elements of his claim.

Turning to the issues of this case, plaintiffs, who are the parents of Renee Kalschuer, claim that on July 10, 1968, when Renee was then eighteen years old, she was injured by walking into a glass-paneled door in Apartment 20-S, an apartment leased by Defendants Louis and Jack Rounick, her sister and brother-in-law, in an apartment building at 215 East 68th Street owned, operated, and controlled by Defendant 215 East 68th Street, Inc.

(487) Plaintiffs claim that the failure of defendants either to mark the glass panel so that it was clearly visible and could not be mistaken for unobstructed space, nor to warn Renee about the danger involved, constitutes negligence which caused her injury. Defendants deny that they were negligent and contend that the injury was caused by Renee's own negligence.

Thus there are three necessary elements in the plaintiff's claim. In order for the plaintiffs to recover, they must establish by a fair preponderance of the credible evidence first, that one or all of the defendants were negligent; second, that such negligence was a proximate cause of the injuries suffered by Renee; and third, that Renee was not guilty of negligence proximately con-

tributing to the accident.

First, as to the requirement of proving negligence, negligence is lack of ordinary care. It is failure to exercise that degree of care which a reasonably prudent person would have exercised under the same circumstances. It may consist of doing something which a reasonably prudent person would not have done under the same circumstances, or in failing to do something which a reasonably prudent person would have done under the same circumstances.

The mere fact that an accident occurs and that someone is injured who is a guest in the apartment does not (488) mean that either the landlord or the tenant is negligent. They are negligent only if the accident is one which

they might reasonably have foreseen or anticipated. Second, as to the requirement of proving proximate cause, an act or omission is a proximate cause of an injury if it is a substantial factor in bringing about the injury, either immediately or through a natural and continuous sequence unbroken by any intervening cause. as to the requirement of proving the absence of contributory negligence, contributory negligence is the failure to exercise that degree of care for one's own safety that a reasonably prudent person would have exercised under all the circumstances. If you find that Renee, by the exercise of ordinary care, should have seen the glass door and failed to see it only because she failed to exercise ordinary care, then you should find her guilty of contributory negligence. If you and that Renee was contributorily negligent and that her negligence was a substantial factor in producing her injury, your verdict must be for the defendants. The law does not permit you to weigh the relative degrees of fault of Renee on the one hand and of the defendants on the other. If you find that any of the defendants was negligent and that such negligence was a proximate cause of the accident, your verdict must be for the plaintiffs unless you find that Renee was negligent and that her negligence was a proximate (489) contributing cause of the accident. If you find that Renee was negligent and that her negligence was a substantial factor in producing her accident, your verdict must be for the defendants, whether or not the defendants were also negligent.

Here the defendants Jack and Lois Rounick were the tenants and the defendant 215 East 68th Street was the landlord or owner of the apartment in which Renee was a social guest.

As far as concerns plaintiff's claim against the landlord, a landlord is required to disclose to his tenant any dangerous condition on the premises existing when the tenant is given possession, of which the landlord knows

or has reason to know, and which is not discoverable for the tenant on reasonable inspection.

The obligation of the landlord extends not only to the tenant, but also to those who enter the leased premises as the social guest of the tenant. Thus if you find that the landlord knew or had reason to know that the glass panel door was dangerous and that those in the apartment would not be likely to realize the danger, and that the dangerous condition was a proximate cause of Renee's injuries and that Renee did not herself contribute to the accident by her own negligence, then you should return a verdict for the plaintiffs against the landlord. If, however, you find either that the landlord (490) did not know and had no reason to know that the glass panel door was dangerous or that the landlord had reason to expect that those using the apartment would be likely to realize the danger, or if you find that Renee failed to exercise reasonable care for her own safety, then your verdict must be in favor of the landlord.

Insofar as concerns plaintiff's claim against the tenant, the tenant owes no duty to his social guests to discover possible dangers in the premises. However, if the tenant actually knows that there exists on the premises a dangerous condition which presents an unreasonable risk of harm to his guests, and that the guests are not likely to discover the condition and to realize the risk, the tenant has a duty to exercise reasonable care either to correct the condition or to warn his guests of the condition and Thus, if you find that the tenants knew that the glass panel door was dangerous and that their guests would not be likely to realize the danger and the dangerous condition was a proximate cause of Renee's injury and that Renee did not contribute to the accident by her own negligence, you will return a verdict against the tenants.

If, on the other hand, you find either that the tenants did not know that the glass panel door was dangerous or

that the tenants had a right to expect that their guest (491) would realize the danger or if you find that Renee failed to exercise reasonable care for her safety, then your verdict must be for the defendants.

What I have been talking about so far is that part of the case that is known as liability. That is, to determine whether any of the defendants are liable. I am now going to talk about a different part of the case, which is known as damages. That is, that assuming one of the defendants is liable, what is the extent of damage for which the plaintiffs should be recompensed.

In charging you on damages, I want to tell you very carefully that I am charging you on damages only because after you have received the charge and go into the jury room for your deliberations, I won't be able to give you any further charge unless you specifically ask for it. So I have to charge you on the entire case at this time. By charging you with respect to damages, I don't want you to infer that I believe that there is any liability. That is solely for you to determine. I am charging you with respect to damages only in the event that you should find that one or more of the defendants is liable. If you find that they are not, you may ignore all of my charge insofar as it relates to the question of damages.

(495) In making all these determinations you may and should rely on your own experience, logic and common sense as well as the evidence in the case.

I am going to talk about another technical aspect of the evidence—excuse me, of your deliberations, and I want to caution you again, that in charging you with respect to this, I am not implying and I don't want you to infer that Renee is entitled to recover at all. This is only if you find that she is entitled to recover something for future earnings that you should give any consideration to my next (496) remarks.

If you find that both the landlord and the tenants are liable, then you must apportion the damages between them on the basis of their relative degrees of responsibility for the injury. If you find that the defendants Jack and Lois Rounick on the one hand and the defendant 215 East 68th Street on the other hand were equally responsible, then you must divide the damages equally between the two of them. If you find they were not equally responsible, you must apportion the damages accordingly.

In deciding these fact issues you are called upon to determine the credibility of witnesses, some of whom were contradicted by other witnesses or exhibits, and some in (497) instances may even have contradicted themselves, either during this testimony here or in previous testimony which may have been read in by way of deposition. In determining the credibility of each witness, and this applies to expert witnesses as well, you consider his demeanor before you, how he impressed you, whether he was frank and forthright or evasive, his personal stake or interest in the case, that is, whether he had any motive to falsify and whether he was in a position to have personal knowledge of matters that were the subject of his testimony.

In short, in deciding whether a witness' testimony was credible or believable, what you do, to use a colloquial expression, is to size him up to determine whether he seems a reliable and truthworthy witness. If you find that any witnesses wilfully testified falsly to any material fact, you may disregard the testimony of those witnesses in total, or you may accept that part which commends itself to your belief or which you find is consistent with other evidence in the case. With respect to the testimony of the doctor who testified as a medical expert, the law allows those skilled in such matters to express their opinions to the nature and probable cause of injuries and to the extent of the effects. This testimony should be

weighed in relation to the knowledge, skill and experience possessed by the wtiness, as shown by the (498) evidence. But it is solely within your province as the jury to determine what weight that testimony should receive. The opinions expressed by such witnesses are not binding or conclusive upon you. It is your duty from all of the evidence and facts and circumstances in the case, including the testimony of these expert witnesses, to determine the questions of fact submitted to you. If the doctors expressed opinions and answers to hypothetical questions, that is, questions which assumed a certain set of facts, you must assume as true all of those facts which were expressed in the question. If the assumed facts were not established by the evidence, then you should disregard the answer to hypothetical questions.

You should not be concerned with who the parties are. The fact that one of the defendants is a corporation or that another may be an affluent individual must not enter into your deliberations. The fact that the plaintiff is a beautiful girl, the fact that she has suffered injuries which would make you very sympathetic to her, must not override the instructions I have given you as to the legal standards which you must apply in determining whether she is to recover in this case. Justice cannot prevail if either sympathy or prejudice enters into your deliberations. Your oath is to render justice fairly and impartially without fear or favor and decide the facts solely on the evidence in the case.

(499) Each juror is entitled to his or her opinion, and you are required to exchange views with your fellow jurors. That is the very purpose of jury deliberation. It is your duty to discuss the evidence with one another. If you have a point of view and if, after reasoning with the other jurors, it appears that your judgment is open to question, then of course you should have no hesitancy in yielding your point of view. But only if you are convinced that the opposite point of view is really one that

satisfies your own judgment and conscience. In other words, you are not required to give up a point of view that you conscientiously believe in simply because you are outnumbered. The purpose of your deliberation is to reach a single verdict that represents the viewpoint of all the jurors, if that is possible.

The verdict of the jury must be unanimous. In order to aid you in your deliberations I have prepared here a set of questions which you should answer. Your answer to each of these questions must be unanimous. If you cannot answer it unanimously, then you cannot make an answer at all with respect to that specific question.

I will pass them out in just a moment, but first I will read them for the benefit of counsel, and I have extra copies for counsel.

- 1) Were the defendants Jack and Lois Rounick (500) guilty of negligence, which was a proximate cause of the accident? Answer yes or no.
- 2) Was the defendant 215 East 68th Street guilty of negligence, which was a proximate cause of the accident? Answer yes or no.

If the answer to both Question 1 and Question 2 is "no," you need answer none of the remaining questions. If the answer to either or both of Questions 1 and 2 is "yes," please proceed as directed below.

3) Was Renee Kalschuer guilty of negligence, which was a proximate contributing cause of the accident? Answer yes or no.

If the answer to Question 3 is "yes," you need answer none of the remaining questions. If the answer is "no," please answer Question 4 and Question 5, if appropriate.

4) What amount of damages do you find to be awarded to plaintiffs for medical and hospital expenses?

Then there is a blank to put in the amount, if any.

For past and future pain, suffering, disability and loss of earnings?

And there is a blank to put in the amount, if any.

5) If your answer to Questions 1 and 2 are both "yes," what is the relative degree of responsibility of the defendant Jack and Lois Rounick? (Blank percent.) (501) 215 East 68th Street, Inc.? (Blank percent.)

And those two percentages add up to 100 percent.

You will answer Question 5 only if you determine that both of the defendants are liable. If only one of them is liable, you don't need to answer Question 5. And if you find that neither one of them is liable, you don't have to answer anything past Question 2.

There is a blank at the bottom to be signed by the foreman; Mr. Negri, having been chosen first, is auto-

matically the foreman.

I will ask the clerk to pass one copy to the jury and one copy to each of counsel, please.

(Pause.)

The Court: Do the plaintiffs have any exceptions or suggestions with respect to the charge?

Mr. Krimsky: Your Honor made a statement that the burden of proof of contributory, or the absence of contributory negligence is on the plaintiff.

The Court: That is the New York State law.

Mr. Krimsky: Very well, sir. I have no exceptions in view of that except that I got the feeling, and I'm not quite sure, you kept saying that even though I go on—I will leave it at that. I withdraw that.

The Court: I have to do that.

(502) Do the defendants Rounick have any exceptions?

Mr. Conway: The only exception I have is where you had classified Lois Rounick as a tenant along with her husband, because she is not a tenant.

The Court: She was the wife of the lessee and I think under the circumstances she would be considered a tenant even though legally she was not a lessee.

Mr. Conway: I respectfully except. I have a request here.

The Court: All right.

Mr. Conway: I ask your Honor to tell the jury that if they find an intervening act of the plaintiff's friends was a substantial cause of her injury and the proximate cause of any, defendant's possible negligence is broken and you must find for the defendants Rounick.

Mr. O'Donnell: I join in that request, your Honor.

The Court: I have already given them the general charge in defining proximate cause as including a continuous chain of causation unbroken by any intervening cause.

Do you want to comment on that?

Mr. Krimsky: The only thing I can say as to that, if you get involved in that, your Honor, there can be one or more—it has to be even though there is intervening cause, and you put it to the jury already, so long as the act or the (503) omission was a substantial factor, even though there may be other factors, they could still find in behalf of the plaintiff. You have indicated that to them.

Mr. Levy: Not only that, your Honor, the intervening act must be a superseding act.

Mr. Conway: If it is a substantial cause.

Mr. Levy: And we are not talking about a really different act. The act of negligence is the windows, where they are and when they are, the fact that somebody moves a window is part of the hazard created by the defendant.

The Court: I think my definition is sufficient. I am afraid if I mention the intervening act I give it undue suggestiveness and they might infer from that that I consider that an intervening act.

Mr. Conway: I think it is a substantial factor that should have been charged in the main charge.

The Court: I don't believe there is a request for that charge. I am afraid if I go back to it now I am going to give it an undue suggestiveness.

Mr. Conway: I respectfully except. Mr. O'Donnell: I join in that, sir.

Mr. Conway: I ask your Honor to tell the jury that if they find a verdict for the plaintiff, they must consider that any such verdict is tax free.

(504) The Court: I will do that.

Mr. O'Donnell: Your Honor, at the beginning of your charge you made a statement to the effect that the building 215 East 68th Street was owned, operated and controlled by 215 East 68th Street, Inc.

The Court: I said that was the allegation.

Mr. O'Donnell: All right. Then I will withdraw the exception to that.

With respect to the problem of contributory negligence, your Honor charged in point 3 of his charge with respect to contributory negligence and at a later time that if the action of Renee Kalschuer was a substantial factor in contributing to the accident, and you also said proximately contributing to the accident, you are to find for the defendant.

Your Honor, I feel that the law of New York is that any negligence on the part, any negligence at all on the part of Renée Kalschuer which contributed to the accident is contributory negligence and that is a far greater burden than "substantial factor" contributing to the negligence. And I would refer the court to request to charge No. 4 in which I asked that the Court charge negligence on the part of the plaintiff which in any way contributed to cause the accident would bar a recovery.

The Court: The New York pattern jury instruction (505) contains the language "substantial contributing factor." It can't be insignificant. It must be significant.

Mr. O'Donnell: Since that book has been printed there have been recent cases stating that that is not correct,

and that the law in New York is any negligence on the part of the plaintiff which in any way contributed to cause the accident would bar a recovery.

Mr. Conway: I join in this request.

The Court: I will clarify that.

Mr. O'Donnell: I think it is in the pocket part.

The Court: I looked in the pocket part, too. I will clarify that point. I won't give exactly the language that you suggest but I will clarify it.

that you suggest, but I will clarify it.

Mr. O'Donnell: I also request the Court charge the submitted requests to charge of 215 East 68th, No. 5 and No. 6. I don't think that they have been actually charged in this case. They come from a case that was decided by Chief Judge Brietel.

The Court: I have read the case and I think the language in it is not the language of a charge. For example, referring to the "gleam in a doting parent's eye,"

et cetera.

Mr. O'Donnell: I will withdraw that portion of the charge.

The Court: I made the rest of it, in substance. (506) Mr. O'Donnell: I respectfully except.

Mr. Krimsky: I appreciate it if it were understood that—I got the feeling in some of your charge you said that just because I charge this point doesn't mean that I feel she should recover. It also doesn't mean that you feel she shouldn't recover.

The Court: I think I said repeatedly that is up to them to determine. I spent an awful long time on damages and if I don't say something like that, they are going to get a very strong picture of damages. So I don't think I should add what you have just asked.

Mr. Krimsky: May I have an exception to the tax credit?

The Court: That is a standard instruction. That is in the New York pattern jury instructions. You may have your exception.

(In open court.)

The Court: I want to add one supplemental charge, and that is, if you proceed to determine any damages to be awarded to the plaintiffs, you should not take into consideration the income taxes with respect to those damages. The damages are not taxable income, so you don't need to add any amount over and above the damages to take care of the taxes that would be paid on the

damages collected.

(507) I would like to clarify one additional thing which I believe is in the charge but which might not have been as it might have been. The law with respect to contributory negligence is that if the plaintiff is contributorily negligent, that is, if she fails to exercise that degree of care for her own safety that a reasonable prudent person would exercise under the circumstances, and if that contributory negligence on the part of the plaintiff was a substantial contributing factor in any degree, then you must find for the defendants. It cannot be an insignificant factor. It must be a significant factor, but it does not have to be a dominating factor. You are not to apportion the responsibility between the plaintiff and the defendants. If Renee was contributorily negligent and if her contributory negligence was a significant contributing factor, then you must find for the defendants.

If, during the course of your deliberations, you find that you cannot recall some of the testimony and it is important to your deliberations to know what the testimony was, you have the power to send a note out to me through the marshal and ask to have a part of the testimony reread, and the reporter will read that part of the testimony to you.

Likewise, if you become confused with respect to any part of the charge and want to have it repeated or (508) clarified, you can send a note out through the marshal and I will do that. I hope it won't be necessary. I

Requests to Charge and Exceptions

hope that you've got the charge firmly in mind and the evidence firmly in mind and are prepared to go in for your deliberations, and that you will be able to reach a verdict one way or the other which will satisfy all of you.

Shall all of the exhibits go with the jury into the

jury room?

Mr. Conway: I would think so.

Mr. O'Donnell: Yes, sir.

The Court: All right. Then the clerk will give the exhibits to the foreman to take with him into the jury room.

Mr. Barsky, you are our alternate. It turns out that we didn't need you because nobody got sick or fell by the wayside. So that you won't be required for deliberations, but your services were valuable nonetheless, because if anything had happened to any of them, you would have had to step in so that we wouldn't have to start all over again in trying the case from the beginning. So thank you very much for your kind attention and for your appearance here; and believe me, those also serve who serve as alternates and don't get to participate in the deliberations.

Alternate Juror No. 1: I was pleased to be here, (509) your Honor. It was a pleasure on my part.

The Court: Thank you. You are excused.

(Alternate Juror excused.)

(At 2:50 p.m., a marshal was duly sworn.)

(At 2:52 p.m., the jury retired to deliberate.)

Mr. O'Donnell: Your Honor, with respect to that portion of your charge which clarified the issue of contributory negligence, I would except to that portion of your charge, sir, on the ground that it is not in compliance with the New York law which states that negligence on the part of a plaintiff which in any way contributed to the cause of the accident would bar recovery. I think your Honor used the word "substantial."

Verdict

The Court: I used the word "significant."
Mr. O'Donnell: I respectfully except.
Mr. Conway: I join in that exception.
The Court: All right. We stand in recess.

(Recess.)

(3:55 p.m. In open court; jury present.)

The Court: Mr. Negri, has the jury reached a verdict?

The Foreman: Yes, we have sir.

The Court: Will you hand it to the clerk, please.

(Pause.)

(510) The Court: Will you read the questions, please.

The Clerk: Yes, sir.

Question 1: Were the defendants Jack and Lois Rouneck guilty of negligence, which was a proximate cause of the accident?

Answer: Yes.

Question 2: Was the defendant 215 East 68th Street guilty of negligence, which was a proximate cause of the accident?

Answer: Yes.

Question 3: Was Renee Kalschuer guilty of negligence, which was a proximate contributing cause of the accident?

Answer: No.

Question 4: What amount of damage do you find should be awarded to plaintiffs:

For medical and hospital expenses?

Answer: \$1800.

For past and future pain, suffering, disability and loss of earnings?

Answer: \$30,000. Total \$31,800.

Verdict

Question 5: If your answers to Questions 1 and 2 are both "yes," what is the relative degree of responsibility of the defendants?

(511) Jack and Lois Rounick?

Answer: 50 percent.

215 East 68th Street, Inc.?

Answer: 50 percent.

Members of the jury, you say you find for the plaintiff in the amount of \$31,800, and so say you all?

The Foreman: We do.

The Court: I want to thank the members of the jury. Mr. Conway: Excuse me, your Honor, may we have the jury polled?

The Court: Yes, you may.

The Clerk: You say you find for the plaintiff in the amount of \$31,800. Listen to your verdict as it stands recorded: You say you find for the plaintiff \$31,800?

(Each member of the jury, upon being asked, "Is that

your verdict," responded in the affirmative.)

The Court: I want to thank the members of the jury not only for you unflagging attention during the trial but also for the deliberations that you gave and for all the time you have taken away from your own duties to be here and participate in our judicial process.

As I think all of you realize, the judicial system is a very important part of our way of life as set up in our Constitution, and perhaps the most important of it are (512) the jurors such as yourselves who take time away from your regular business and your private lives and come into court and spend time listening to evidence and deliberating and reaching a verdict, and I certainly want to express the appreciation of myself and of counsel and the parties for your efforts and your devotion to duty in connection with the case.

Thank you very much.

The Clerk: Would you please report to Room 109. (The jury was discharged and left the courtroom.)

The Clerk: Your Honor, may we mark the verdict as Court Exhibit 1?

The Court: Yes.

(Court Exhibit 1 marked for identification.)

Mr. Krimsky: If your Honor please, I'd like to thank you very much for the courtesy you have shown me. I personally, I really enjoyed trying before your Honor. I thought you were fair, and I appreciate everything you have done.

The Court: We enjoyed having you with us.

Are there any motions?

Mr. Conway: Yes, your Honor. On behalf of Defendants Rounick I move to set aside the verdict as being contrary to the various applicable sections of the rules of practice, particularly Rules 50 and 59.

(513) The Court: Your motions are denied.

Mr. Conway: Exception, sir.

I now move for judgment notwithstanding the verdict.

The Court: Denied.

Mr. Conway: Exception. We do have a couple of unreserved decisions.

The Court: As to all the motions on which I have reserved decision, those motions are denied.

Mr. Conway: Exception, your Honor.

Mr. O'Donnell: With respect to Defendant 215 East 68th Street, Inc., I respectfully move to set aside the verdict as contrary to the law and contrary to the evidence pursuant to all the applicable provisions of the Federal Rules of Civil Procedure, including Rules 50 and 69.

The Court: Denied.

Mr. O'Donnell: Exception, your Honor.

I respectfully move at this time for judgment in favor of Defendant 215 East 68th Street, Inc., notwithstanding the verdict in this case.

The Court: The motion is denied.

Mr. O'Donnell: Exception, sir.

Now, with respect to the motions made at the end of the plaintife's case for dismissal for failure to prove a prima facie case and all the other motions I made at that time, (514) I respectfully renew them at this time.

The Court: All motions as to which decisions were reserved are denied.

Mr. O'Donnell: May I have an exception to that, sir. With respect to the motions made at the end of the entire case by Defendant 215 East 68th Street, Inc., I respectfully renew those motions at this time.

The Court: All of such motions as to which decision was reserved are denied.

Mr. O'Donnell: Exception.

Mr. Conway: Your Honor, I move for judgment now over 215 East 68th Street on my cross-complaint.

The Court: You can argue that if you want to. I will hear you.

Mr. Conway: All right, sir.

So far as the tenant is concerned, the tenant's only responsibility here toward the plaintiff was that of the duty owed to a social guest. At the time of this accident the tenants were not in the apartment at that time. The cause of this accident, if any, the jury so found, was because of the construction and because of the—because of the construction of the doors. That is the thing that is implicit in their verdict. We were not there, we had nothing to do with the condition of the doors at the time of the accident. The (515) intervening cause was—was done with the way the doors were constructed. With that we had nothing to do. So I move for judgment over.

The Court: The motion is denied.

Mr. Conway: Exception.

Mr. O'Donnell: With respect to Defendant 215 East 68th Street, Inc., I respectfully move for judgment over against Defendants Lois and Jack Rounick on the ground

that they themselves were the intervening cause and were responsible for this accident in that it is implict in the jury's verdict that the defendants Rounick were aware of a condition which existed in their apartment, an apartment which had been leased to them and which was under their control and supervision, that they could have provided both reasonable notice to the landlord, reasonable notice to Miss Kalschuer, and could have also temporarily marked the window or door involved so as to afford temporary notice until such time as decals would have been And therefore I obtained and placed upon the doors. move their negligence was the intervening cause and therefore I move for judgment over against themselves on the cross-complaint of defendant on behalf of Defendant 215 East 68th Street, Inc.

The Court: I deny the motion.

Mr. O'Donnell: Exception, your Honor.

With respect to the cross-complaint and basis for (516) relief against Defendants Jack Rounick and Lois Rounick, pursuant to Rule 13 of the Rules of Civil Procedure, your Honor, based upon the terms and conditions of the lease, the Rounicks were to hold the defendant 215 East 68th Street harmless from any negligence with respect to the premises except the negligence of the landlord itself. And I respectfully move for judgment over based on that cross-complaint.

The Court: That motion is denied.

Mr. O'Donnell: I respectfully except, your Honor. And with respect to further cross-complaint, the defendants Rounick represented to the defendant 215 East 68th Street in that lease that they would take good care of the demised premises and fixtures therein, and that lease was in full force and effect at the time the accident occurred herein, and that the defendants warranted pursuant to Paragraph 10 of that lease that they would hold the defendant 215 East 68th Street, Inc. harmless from

any negligence with the exception of the negligence of the landlord itself.

The Court: That motion is denied.

Mr. O'Donnell: I respectfully except, your Honor.

Thank you, sir.

The Court: Is that your last motion, Mr. O'Donnell?

Mr. O'Donnell: Yes, sir.

The Court: I will direct the clerk to enter the (517) judgment.

Mr. Krimsky: Thank you, sir. The Court: Anything further?

Thank you all. It has been a most interesting case and I enjoyed the participation of all of you.

(Concluded at 4:20 p.m.)

Requests to Charge of Defendants Rounick.

- 1. Plaintiff being a social guest, must take the premises as she finds them, and is entitled to no greater protection than members of the family. Krause v. Alper, 4 N. Y. 2d 518.
- 2. The only duty on the part of an owner of premises to a social guest is to use reasonable care to disclose any danger known to him but not likely to be discovered by the guest. Bernel v. Baptist Fresh Air Soc., 275 A. D. 22, affd. 300 N. Y. 486.
- 3. The law does not charge the defendants Rounick with the duty of guarding against the remote possibility of the happening of an accident which could not reasonably be foreseen or anticipated. Cooper v. Scharf, 11 A. D. 2d 101.
- 4. The Rounicks, not being present in their apartment at the time of the accident, cannot be charged with any condition created by the plaintiff or her guests.
- 5. The plaintiff was bound to see what, by the proper use of her senses, she should have seen. Failure to do so is contributory negligence as a matter of law. Weigand v. United Traction Co., 221 N. Y. 39.

Respectfully submitted,

DANIEL J. COUGHLIN, Esq.,
Attorney for Defendants,
Jack and Lois Rounick

George J. Conway Of Counsel

Requests to Charge of Defendant 215 East 68th Street, Inc.

- 1. The plaintiffs must establish by a fair preponderance of the evidence that they have good causes of action, and therefore, must show by such a preponderance of the evidence, the existence of all the facts required to sustain them. Spinneweber v. Every, 189 App. Div. 35, 177 N. Y. S. 801.
- 2. The plaintiffs have the burden of establishing not only the negligence of defendant, 215 East 68th Street, Inc., but that Renee Kalcheuer was free of contributory negligence. De Nisi v. J. Krugman Co., 256 App. Div. 567, 10 N. Y. S. 2d 681, affd. 281 N. Y. 851, 24 N. E. 2d 497, Fitzpatrick v. International Ry. Co., 252 N. Y. 127, 169 N. E. 312.
- 3. Plaintiff, Renee Kalscheuer, was required to exercise reasonable care for her own safety, that is—the same degree of care that a reasonably prudent person would have exercised for his own safety under the same circumstances. The law does not permit you to weigh the degree of fault of plaintiff and defendants but requires that if you find that plaintiff was guilty of any negligence your verdict be for defendants, even though you find that a defendant or defendants were also negligent. If, however, you find that plaintiff did exercise reasonable care under the circumstances as you find them to have been at the time and place of her injury, plaintiff was free of negligence and, provided you find that one or more of the defendants was guilty of any negligence, your verdict will be for plaintiff. PJI 2.35.
- 4. Negligence on the part of plaintiff which in any way contributed to cause the accident would bar a recovery. Fitzpatrick v. International Ry. Co., 252 N. Y. 127, 169 N. E. 312; Waks v. New York City Transit Authority, New York Law Journal of May 8, 1970.

Requests to Charge of Defendant 215 East 68th Street, Inc.

- 5. Plaintiff Renee Kalscheuer was bound to see what by the proper use of her senses she might have seen. Her failure to do so was negligence. Weigand v. United Traction Co., 221 N. Y. 39, 116 N. E. 345; Abair v. City of New York, 295 N. Y. 789; Cooper v. Scharf, 11 A. D. 2d 101, 202 N. Y. S. 2d 63; Vella v. Seacoast Towers "A", Inc., 32 A. D. 2d 813, 302 N. Y. S. 2d 451.
- 6. If you find that the defendants were equally responsible for the accident, then they share the liability on an equal basis. If on the other hand, you find that one or two of the defendants were more culpable or more at fault or to blame for the accident than the other, and thus more responsible for the injuries which were sustained by the plaintiff, then you are to assess the relative responsibility of these defendants and indicate to me in your verdict, what part, by percentage, with which each responsible defendant is to be charged. Dole v. Dow Chemical Co., 30 N. Y. 2d 143.
- 7. The Court takes note of the fact that people with rare and special talents may achieve high financial rewards, but the probability of selection for the great rewards is relatively low. A jury may not assume that a young student or aspiring model will earn the income of a model, even in the median group. Her future is a highly speculative one, namely, whether she will ever receive recognition or the financial reward that results from such recognition. Grayson v. Irvmar Realty Corp., 7 A. D. 2d 436, 184 N. Y. S. 2d 33.
- 8. In determining, therefore, the amount to be recovered, the jury may consider the gifts attributed to plaintiff; the training she has received; the training she is likely to receive; the opportunities and the recognition she already has had; the opportunities she is likely to have in the future; the fact that even though the op-

Requests to Charge of Defendant 215 East 68th Street, Inc.

portunities is limited to the very few; the fact that there are many risks and contingencies, other than accidents, which may divert a would-be model from her career; and, that it is assessing directly not so much future earning capacity as the opportunities for a practical chance at such future earning capacity. Also consider that she would be able to do modeling work which does not require the exposure of the injured areas, and if some of her modeling work might require such exposure, you may consider whether or not cosmetics or make-up could be used to cover up the area in question. The foregoing factors to be considered must reflect substantial development in the would-be model's career. gleam in a doting parent's eye and every self-delusion as to one's potentialities must be skeptically eradicated. The jury is not to assess within the limits of wishful thinking but is to assess the genuine potentialities, although not yet realized, as evidenced by objective circumstances. Grayson v. Irvmar Realty Corp., 7 A. D. 2d 436, 184 N. Y. S. 2d 33.

Respectfully submitted,

McLAUGHLIN, FISCELLA & GERVAIS
Attorneys for Defendant
215 East 68th Street, Inc.

James M. O'Donnell, Of Counsel.

Plaintiff's Request for Points for Charge.

1. A New York State statute provides as follows:

"All transparent glass doors " " in public buildings " " " shall be marked in such manner as shall be calculated to warn persons using the same that such doors are glass doors."

30 McKinney §241-b

- 2. An apartment building is included in the term "public building." 30 McKinney §2
- 3. Failure to observe a standard imposed by statute is negligence as a matter of law. *Tedla v. Ellman*, 280 N. Y. 124, 19 N. E. 2d 987.
- 4. Violation of a statute relating to the safety of buildings is negligence per se. *Davidoff v. Cohon*, 136 Misc. 404, 241 N. Y. S. 436; *Brown v. Wittner*, 43 A. D. 135, 59 N. Y. S. 385.
- 5. If you find that one or both of the defendants violated the statute previously referred to, then you may find negligence on such defendant or defendants.
- 6. Contributory negligence is not a bar to plaintiff's recovery where the statute violated by the defendant is construed as having the purpose to protect the injured person against the consequences of his own negligence. Salomon v. Timpson Place Construction Corp., 166 Misc. 506, 2 N. Y. S. 2d 718.
- 7. He who ignores the statutory mandate should not be permitted to escape liability for an accident due to his omission, by casting the entire burden of due care upon the injured party. *Id.*
- 8. If you find that defendant or defendants violated the previously mentioned statute, then plaintiff may recover even if you find plaintiff was contributorily negligent.

Plaintiff's Request for Points for Charge

- 9. The possessor of a premises must exercise reasonable care to disclose to a social visitor dangerous defects known to the possessor and not likely to be discovered by a social visitor. *Brzostowski v. Coca-Cola Bottling Co.*, 16 A. D. 2d 196, 199, 226 N. Y. S 2d 464.
- 10. A social visitor is regarded under the law as a licensee and therefore, an occupier of premises must warn the visitor of hidden hazards or hidden dangers known to the occupier. Finkle v. Zimmerman, 271 N. Y. S. 2d 820, 26 A. D. 179; Dorfman v. Aronowitz, 219 N. Y. S. 2d 294, 309 Misc. 2d 871.
- 11. It is for the jury to determine whether the circumstances existing at the time of the accident gave an illusion of unobstructed space so that a reasonable man might fail to note the existence of a closed glass door. Madey v. Gray Drug Stores, 40 A. D. 2d 270; Grabel v. Handro Co., Inc., 161 N. Y. S. 2d 998; Shannon v. Broadway and 41st Street Corp., 298 N. Y. 589.

KREMER, KRIMSKY & LUTERMAN, P.C.
By Martin M. Krimsky
Attorney for Plaintiff

Judgment Appealed From.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

The issues in the above entitled action having been brought on regularly for trial before the Honorable William C. Conner, United States District Judge, and a jury on March 18, 19, 20 and 21, 1974, and the Court having submitted the attached special verdict to the jury, and the jury having answered the special verdict as indicated thereon, and the jury having returned the special verdict in favor of the plaintiffs, and the Court having denied all motions, it is,

Ordered, Adjudged and Decreed, that plaintiffs, Renee Kalscheur, a minor by her parents and natural guardians, Norbert Kalscheur and Isabel Kalscheur, and Norbert alscheur and Isabel Kalscheur in their own right, have judgment against the defendants, Jack Rounick and Lois Rounick and 215 East 68th Street, Inc., in the amount of \$31,800.00.

Dated: New York, N. Y., March 22, 1974

RAYMOND F. BURGHARDT Clerk

Approved:

William C. Conner United States District Judge.

Court's Exhibit 1 for Identification-Verdict.

1. Were the defendants Jack and Lois Rounick guilty of negligence, which was a proximate cause of the accident?

(Answer Yes or No) Yes

2. Was the defendant 215 East 68th Street guilty of negligence, which was a proximate cause of the accident?

(Answer Yes or No) Yes

If the answer to both Question 1 and Question 2 is "No", you need answer none of the remaining questions. If the answer to either or both of Questions 1 and 2 is "Yes", please proceed as directed below.

3. Was Renee Kalscheuer guilty of negligence, which was a proximate contributing cause of the accident?

(Answer Yes or No) No

If the answer to question 3 is "Yes", you need answer none of the remaining questions. If the answer is "No", please answer Question 4 and Question 5, if appropriate.

4. What amount of damage do you find should be awarded to plaintiffs:

For medical and hospital expenses?	\$1,800
For past and future pain, suffering, disability and loss of earnings?	\$30,000
Total	\$31,800

5. If your answers to Questions 1 and 2 are both "Yes", what is the relative degree of responsibility of the defendants?

a.	Jack and Lois Rounick	50%
	215 East 68th Street, Inc.	50%
	Total	100%

March 21, 1974.

HENRY P. NEGIN Foreman

Notice of Appeal of Defendants Rounick.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

Sirs:

Please Take Notice, that the defendants, Jack Rounick and Lois Rounick, do hereby appeal to the United States Court of Appeals for the Second Circuit from so much of a judgment filed in this court on March 28, 1974 which adjudges that the plaintiff, Renee Kalscheur, a minor, by her parents and natural guardians, Norbert Kalscheur and Isabel Kalscheur, and Norbert Kalscheur and Isabel Kalscheur, in their own right, have judgment against the defendants, Jack Rounick and Lois Rounick, in the amount of \$31,800.00, and dismisses the crosscomplaint of the defendants, Jack Rounick and Lois Rounick, against the defendant, 215 East 68th Street, Inc., and the said defendants, Jack Rounick and Lois Rounick, appeal from said portions of the judgment on both questions of law and fact.

Dated, New York, N. Y., April 22, 1974.

Yours, etc.,

DANIEL J. COUGHLIN
Attorney for Defendants
Jack Rounick and Lois Rounick
Office & P. O. Address
110 William Street
New York, N. Y. 10038

Notice of Appeal of Defendants Rounick

To:

Norman J. Landau
Attorney for Plaintiffs
Office & P. O. Address
233 Broadway
New York, N. Y. 10007

McLaughlin, Fiscella & Gervais
Attorneys for Defendant
215 East 68th Street, Inc.
Office & P. O. Address
80 John Street
New York, N. Y. 10038

Notice of Appeal of Defendant 215 East 68th Street, Inc.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

Notice is hereby given that 215 East 68th Street, Inc., one of the defendants above named, hereby appeals to the United States Court of Appeals for the Second Circuit from a judgment filed in this Court on the 28th day of March, 1974, and the said defendant 215 East 68th Street Inc. appeals from the whole of said judgment as to the questions of law and fact.

Dated: New York, New York, April , 1974.

Yours, etc.,

McLAUGHLIN, FISCELLA & GERVAIS

By (s) James M. McLaughlin, Jr.

a member of the firm

Attorneys for Defendant

215 East 6th Street Inc.

Office & P. O. Address

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New York, New York 10038

(212) 248-4430

Notice of Appeal of Defendant 215 East 68th Street, Inc.

To:

Norman J. Landau, Esq.
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Office & P. O. Address
233 Broadway
New York, New York

Daniel J. Coughlin, Esq.
Attorney for Defendants Rounick
Office & P. O. Address
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New York, New York

Clerk

United States District Court Southern District of New York

Kremer, Krimsky & Luterman, P.C. Attorneys for Plaintiffs One East Penn Square Philadelphia, Pa. 19107

The Reporter Co., Inc., 11 Park Place, New York, N. For the econd Circuit

Renee Kalscheur by her parents and natural guardian Norbort Kalscheur and Isabel Kalscheur, in their own right.

Plaintiffs-Appellees against

Jack Rounick and louis Rounick

Defendants-Appellants

Inces 215 East 68th. Street

Defendant-Appellant

On appeal from the United States District Court for the Southern District of New York

AFFIDAVIT OF SERVICE BY MAIL

Dealdul

State of Retw Bork, County of New York

Raymond J. Braddick,

agent for Daniel J. Coughlinbeing duly sworn deposes and says that the attorney for the above named Defendants-Appellants herein. That he is over 21 years

of age, is not a party to the action and resides at 8 Mill Lane Levittewn, Ne / York

That on the 29th day of July , 1974 . he served the within

and Exhibit Volume Appendix Kremer, Krimsky & Luterman P.C. upon attorney g for the above named Plaintiffs-Appellees

1 copy of Exh. Velume

by depositing 2 copies of Appendiof the same securely enclosed in a post-paid wrapper in the Post Office regularly maintained by the United States Government at 90 Church Street, New York, New York

directed to the said attorney for the Plaintiffs-Appellees at No. One East Penn Square Philadelphia Pennsylvania

that being the address within the state designated by them for that purpose, or the place where they then kept an office, between which places there then was and now is a regular communication by mail.

Sworn to before me, this ____29th.

ROLAND W. JOHNSON Notary Public, State of New York No. 4509705

Qualified in Delawere County mmission Expires March 30, 19

